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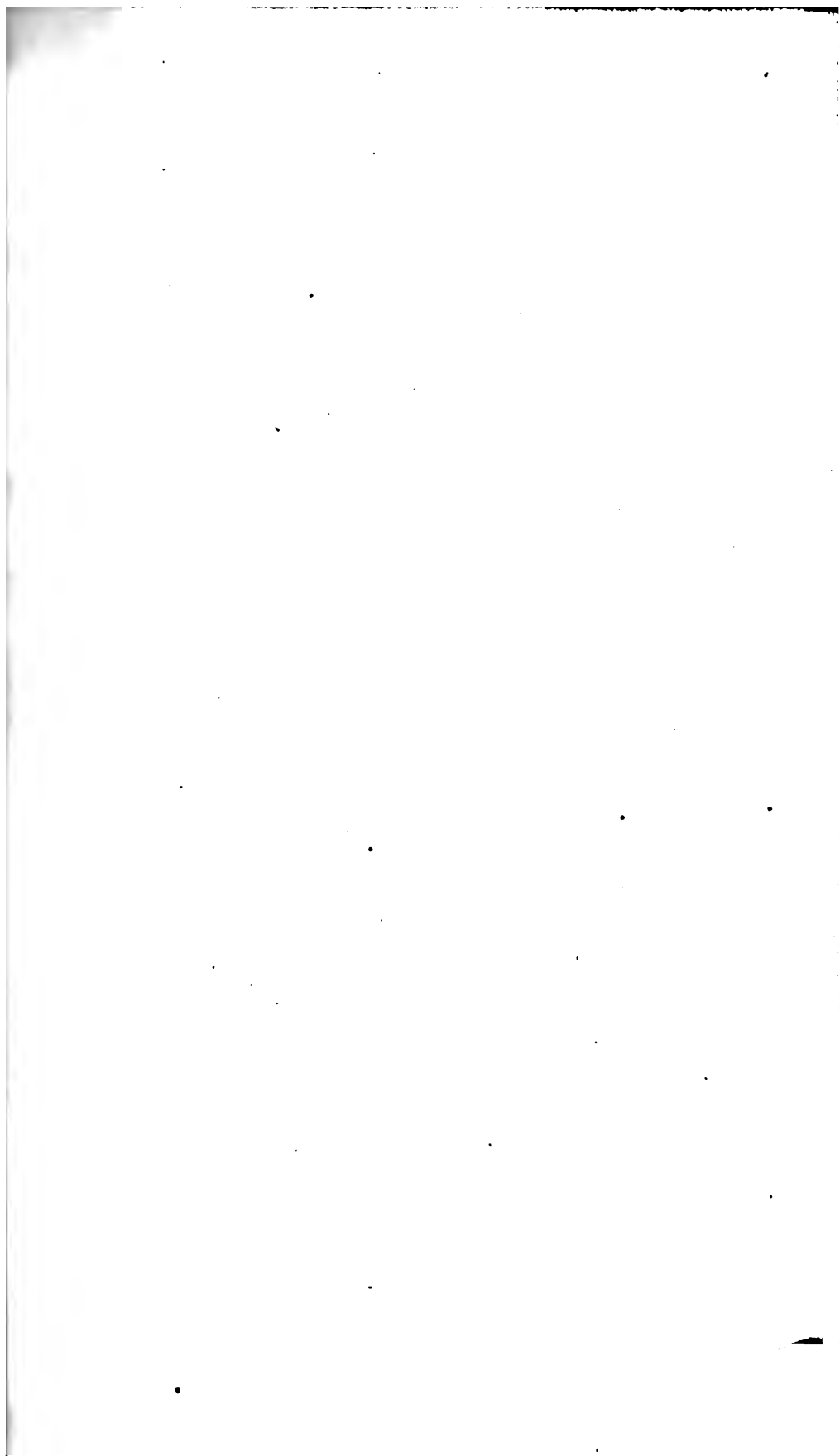
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THE
PRACTICE AT LAW,
IN EQUITY,
AND IN
SPECIAL PROCEEDINGS,
IN ALL
THE COURTS OF RECORD IN THE STATE OF
NEW YORK;

WITH APPROPRIATE FORMS.

BY WILLIAM WAIT,
COUNSELLOR AT LAW.

VOLUME III.

ALBANY:
WILLIAM GOULD & SON,
LAW BOOKSELLERS AND PUBLISHERS,
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Entered, according to act of Congress, in the year eighteen hundred and seventy-four,

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PREFATORY NOTE.

THIS volume continues the work down to the entry of judgment. The matters which remain to be discussed are the enforcement of judgments by execution or otherwise; the review by appeal; the practice in some incidental proceedings; the subject of special proceedings and actions, and surrogate's practice. A brief examination of the three volumes now published will show the great number and variety of points and principles which must be considered, and will also show how concisely this may be done. But it is to be remembered that an attempt is here made to give the entire practice at law, in equity and in special proceedings. No other single work professes to cover so wide a field; and yet, in presenting the various points, the utmost conciseness has been studied, so far as was practicable with the details of the practice, as distinguished from a mere outline or summary of the practice. In point of expense, or in the saving of labor in examination of questions, it will be well to notice that this work gives the principles that will usually be sought for in the following works: Tillinghast & Shearman, 2; Whittaker, 2; Tiffany & Smith, 3; Van Santvoord's Eq., 2; Burrill, 3; Barbour's Ch., 2; Hoffman's Ch., 3; Graham, 1; Thompson's Prov. Rem., 1; Hoffman's Prov. Rem., 1; Riddle's Supp. Prac., 1; Crary's Special Proc., 2; Abbott's Forms, 2; McCall's Forms, 1; Dayton's Surr., 1; Willard's Exrs., 1.

This list does not include Annotated Codes, nor the Revised Statutes, nor the various English works on practice, nor those of the several States of the Union. The most important point to be mentioned is, that nearly all the works named are several years behind the authorities, while this work is made up from the late decisions so far as they relate to points of practice. All the other works have been examined, and some of them have been found useful, in the way of suggestion,

rather than as a reference to authorities. The text is designed as a full statement of the practice, as found in the latest cases and statutes. The forms are such as are in general use, and are inserted in their appropriate places, as a matter of convenience. If other forms are required, resort must be had to works devoted to that particular subject, and among them the excellent work of Abbott Brothers will be found very valuable.

The remainder of the work will be completed and furnished at an early day, and as promptly as the preceding volumes.

WILLIAM WAIT.

January 1, 1874.

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PART VIII.

TRIAL AND NEW TRIAL

CHAPTER I.

TRIALS IN GENERAL

ARTICLE I.

WHAT IS AND WHAT IS NOT A TRIAL.

Section 1. What is and what is not a trial.

a. In general. When all the parties to an action have served all the pleadings which the law and the particular circumstances of the case require, the action may be said to be at issue and ready for trial.

The usual expression in reference to the disposition of issues is, that an issue in *law* or demurrer is said to be *argued*, and that an issue in *fact* is *tried*.

At an early period the term "trial" was employed in relation to both issues of law and of fact. Stephen's Plead., Supplement, note 29; 1 Spence's Eq. Jur. 128, note. And for a long time the term "trial" was limited in its meaning to the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause for the purpose of determining such issue. *Ward v. Davis*, 6 How. 274, 275; *Curtis v. Colston*, 4 Mas. C. C. 232. The trial of an issue of fact in an equitable suit under the former chancery practice, was called the *hearing*. 2 Bouv. Inst. 4438.

The Code of this State has changed this practice, by declaring that "a trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact." Code, § 252. Under the present practice, the term "trial" is proper, whether applied to issues of law or of fact; and to such issues in all actions, whether legal or equitable. But, in all cases, there must be an issue before there can be a trial, since a trial is defined to be a judicial examination of the issues. *Sluyter v. Smith*, 2

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Bosw. 673, 678; *Pardee v. Schenck*, 11 How. 500; *Chapman v. Lemon*, id. 235.

b. What is a trial. There is a trial when the merits of the action are brought up, and the cause is placed upon the calendar, and the issues whether of law or of fact, and whether arising on the pleadings or out of subsequent proceedings, are presented to the court, and by the court judicially examined. *Place v. Butternutts Woolen and Cotton Manufacturing Co.*, 28 How. 184, 186.

Where evidence is given on both sides, and the plaintiff is nonsuited at the close of the evidence, this is a trial. *Allaire v. Lee*, 1 Abb. 125; 4 Duer, 609.

So of a cause at issue upon questions of fact, where the cause has been regularly noticed and placed upon the calendar, and where the complaint is dismissed on a regular call of the calendar on account of the plaintiff's failure to appear. *Mora v. Great Western Ins. Co.*, 10 Bosw. 622. So, upon an issue of fact, where the cause is noticed and put on the calendar by the defendant, and the complaint is dismissed on a regular call of the calendar, because no one appears in behalf of the plaintiff. *Rogers v. Degen*, 10 Abb. 313; 19 How. 119; 4 Bosw. 669; *Dodd v. Curry*, 4 How. 123; 2 Code R. 69; *Moffatt v. Ford*, 14 Barb. 577; *Jones v. Case*, 38 How. 349.

The argument of a demurrer, upon which a judgment is rendered, which is a final disposition of the action, is a trial. *Small v. Ludlow*, 1 Hilt. 307. But an argument upon a demurrer, noticed as frivolous, is not a trial, because if the judge does not see that the demurrer is frivolous, he makes no decision upon the issues. *Ib.* See *Bell v. Noah*, 24 How. 478; *Butchers and Drovers' Bank, etc., v. Jacobson*, 22 id. 470; *Rochester City Bank v. Rapelje*, 12 id. 26; *Marquisee v. Brigham*, id. 399; *Roberts v. Clark*, 10 id. 451; *Gould v. Carpenter*, 7 id. 97; *Bernhard v. Kapp*, 11 Abb. N. S. 342.

But where an application is made for judgment on a pleading as frivolous, under section 247 of the Code, which is granted absolutely, without leave to plead over, this is a trial. *Hill v. Simpson*, 11 Abb. N. S. 343.

c. What is not a trial. A motion for judgment upon a pleading as frivolous, under section 247 of the Code, is not a trial. *Bell v. Noah*, 24 How. 478; *Butchers and Drovers' Bank, etc., v. Jacobson*, 22 id. 470; *Rochester City Bank v. Rapelje*, 12 id.

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28; *Marquisee v. Brigham*, id. 399; *Roberts v. Clark*, 10 id. 451; *Gould v. Carpenter*, 7 id. 97; *Bernhard v. Kapp*, 11 Abb. N. S. 342. But if, upon such an application, the pleading is held to be frivolous, and no leave is granted to plead over, it is a trial. *Hill v. Simpson*, 11 Abb. 343.

There is no trial in a case in which the defendant does not interpose any answer, and the plaintiff's damages are assessed by a sheriff's jury. *Randolph v. Foster*, 4 Abb. 262; 3 E. D. Smith, 648.

So of a case in which no issue is joined, and the case is referred to a referee to take proofs, and report the facts to the court. *Chapman v. Lemon*, 11 How. 235. Where a complaint is dismissed, on motion at special term, for want of prosecution, there is no trial. *Tillspangh v. Dick*, 8 How. 33. It is otherwise where the complaint is dismissed at the trial, on the ground that it does not state facts sufficient to constitute a cause of action. *Shannon v. Brower*, 2 Abb. 377.

ARTICLE II.

WHEN AND BY WHOM AN ACTION MAY BE BROUGHT TO TRIAL.

Section 1. At what time.

a. In general. The Code provides, that at any time after issue, and at least fourteen days before the court, either party may give notice of trial. Code, § 256.

It is evident that there cannot be a trial, in the true sense of the term, until all necessary parties are legally before the court, and proper issues have been joined.

In an action against three defendants for the enforcement of a specific performance of their joint contract for the purchase of real estate of the plaintiff, the summons must be served upon all the defendants, or there must be an appearance in the action by them, before the cause can be regularly brought to trial. *Powell v. Finch*, 5 Duer, 666. If two of such defendants answer, and proceed to the trial, the court will refuse to proceed with the cause whenever it appears that the third defendant has not appeared or been served with a summons. *Ib.*

In an action for the foreclosure of a mortgage, there cannot be a reference of all the issues while there are any defendants against whom the plaintiff seeks a judgment over for a deficiency,

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but who have not been served with a summons, or with a notice that no personal claim is made against them, and they have not appeared. *Goodyear v. Brooks*, 2 Abb. N. S. 296 ; 4 Rob. 682.

One or more of several defendants named in the summons in a foreclosure suit cannot bring the action to trial while the other defendants have neither been served with the summons nor appeared in the action. *Morris v. Crawford*, 16 Abb. 124. In such a case the proper practice is to move for a dismissal of the complaint, instead of noticing the cause for trial. *Ib.*

An action for the partition of land cannot be brought to trial before all the defendants served with the summons have answered, or the time to answer has expired as to them. *Ward v. Dewey*, 12 How. 193.

Until the cause is in such a situation that a final judgment can be rendered between all the parties, it will be irregular to bring it on for trial. *Ib.* See *Burnham v. De Bevoise*, 8 How. 160.

An action in the nature of a creditor's suit will not be heard by the court, if it appears that there cannot be a complete determination of the controversy, unless other parties are brought in. *Shaver v. Brainard*, 29 Barb. 25. And this is the rule even where the defect appears upon the face of the complaint, and the defendants neither demur nor raise the objection by answer or upon the trial. *Ib.*

It is not only indispensable that the necessary parties are before the court, but it is equally important that there should be complete and proper issues joined. And where one of several statements of defense in an answer is stricken out by the special term as irrelevant, and no bar to the action, and the defendant appeals from such decision to the general term, the plaintiff cannot, while such appeal is pending, bring on and try the remaining issues at the circuit. *Trustees of Penn Yan v. Forbes*, 8 How. 285. In such a case there would be no issue either of law or of fact, as to the matter stricken out ; and until the decision upon the appeal, the question will remain open whether the answer shall stand. *Ib.*

Where, however, there is a demurrer to a part of an answer, the plaintiff may bring on the issues of fact for trial before the decision upon the issues of law. *Palmer v. Smedley*, 13 Abb. 185. In that event there would be complete issues joined, and the court may permit the issues of fact to the first trial. Code, § 251 ; *Warner v. Wigers*, 2 Sandf. 635. Where a plaintiff

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amends his complaint after issue joined, this entitles the defendant to put in a new answer to the amended complaint, and the cause cannot be regularly brought to trial until the time to answer expires. *Akin v. Albany Northern R. R. Co.*, 14 How. 337.

So long as the right to amend the pleadings exists, every notice of trial will be subject to the contingency that an amendment may prevent a trial of the cause pursuant to the notice. While the right to amend the answer exists, the plaintiff is not required to notice the cause for trial; and an omission to do so is not an unreasonable right to proceed in the cause. *Cusson v. Whalon*, 5 How. 302; 1 Code R. N. S. 27.

Where an answer is served by mail, it may be amended at any time within forty days, if done in good faith. *Evans v. Lichtenstein*, 9 Abb. N. S. 141; *Washburn v. Herrick*, 4 How. 15; 2 Code R. 2. But the court will not tolerate the service of an amended pleading for the mere purpose of delay. *Allen v. Compton*, 8 How. 251; *Rogers v. Rathbun*, id. 466; *Burrall v. Moore*, 5 Duer, 64; Code, § 172.

Where an action is brought upon a promissory note, and the answer does not deny the allegations in the complaint, but interposes a set-off, or counter-claim, to which no reply is interposed, there is no issue to try, and, therefore, no notice of trial is necessary. *Pardee v. Schenck*, 11 How. 500.

In an action brought against several defendants for the recovery of money alleged to be due upon a joint contract, if some of the defendants fail to answer, and the others deny the complaint, the plaintiff cannot regularly enter up judgment against the former as for want of an answer, and then proceed to trial and judgment against the latter. *Sluyter v. Smith*, 2 Bosw. 673. In such a case the action ought to be brought to trial as against all the defendants, so that upon the trial of the issues there may be but one assessment of damages, and one judgment against all the defendants. *Ib.*

The right to amend an answer as of course, and thus to delay a trial for a time, may be waived, and if a defendant serves an answer, and afterward, before the expiration of the time to amend the answer, he serves a notice of trial, he will waive the right to amend as of course. *Phillips v. Suydam*, 6 Abb. N. S. 289; 54 Barb. 153.

An offer in writing, under section 385 of the Code, that the

By whom action may be brought to trial.

plaintiff may take judgment, etc., amounts to a written stipulation, and precludes the defendant from taking any steps in the cause until the ten days have elapsed, or the written notice of the plaintiff's acceptance is served. *Walker v. Johnson*, 8 How. 240. A defendant who desires to avail himself of the provisions of this section must make his offer at such time that the plaintiff will have ten days before the trial in which to elect whether he will accept the offer; and if the offer is made so late that the cause is reached and tried before the expiration of the ten days, the parties will stand as though no offer had been made. *Pomeroy v. Hulin*, 7 How. 161.

The death of a sole plaintiff prevents any proceedings in the action until there has been a revival by the personal representatives of the deceased. *Jarvis v. Felch*, 14 Abb. 46.

b. *By whom action may be brought to trial.* Either party giving the notice may bring the issue to trial, and in the absence of the adverse party, unless the court, for good cause shown, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict or judgment as the case may require. A separate trial between a plaintiff and any of the several defendants may be allowed by the court whenever, in its opinion, justice will thereby be promoted. • Code, § 258.

The term "party" may relate to a single plaintiff, and a single defendant, in which case a notice by either of them would be sufficient. But there are frequently several parties, plaintiffs or defendants, or both; and in that event all the parties plaintiffs, or all the parties defendants are, as a general rule, treated as though they, together, constituted one of the parties to such action, especially where the defenses are identical.

If there are several defendants who are each of them entitled to notice of trial, all must have notice before the plaintiff can move on the trial. On the other hand, all the defendants must have given notice of trial to the plaintiff before any of them can move the trial as against the plaintiff. *Ward v. Dewey*, 12 How. 193.

So an action cannot be brought to trial by one or more of the defendants, while there are other defendants who have not been served with the summons nor appeared in the action. *Morris v. Crawford*, 16 Abb. 124.

Nor can a plaintiff bring a cause to trial against a part of the defendants, while a part of them have not been served with pro-

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cess, nor appeared in the action. *Powell v. Finch*, 5 Duer, 666.

But where two defendants have each a separate and different defense, and appeal by separate attorneys, the court may permit one of the defendants to bring on the trial, and if the plaintiff fails to appear, the complaint may be dismissed. *Gurnee v. Hoxie*, 29 Barb. 547. In the last case it is said that "either party" clearly means "either party to the particular issue to be tried." The true construction, however, is that all the plaintiffs constitute one party to the action, while all the defendants constitute the other; and the exception to that rule is that which the Code, section 258, provides, which is, that the court may allow a separate trial between a plaintiff and any of the several defendants whenever the court is of opinion that justice will thereby be promoted. It will be observed that though there may be several defendants, yet they may all constitute the party mentioned in this section, especially where they all rely upon the same ground of defense.

The exception of allowing a separate trial in the instance specified shows the true construction to be that no other exception was intended, because it is a familiar rule of construction that the express mention of one thing excludes the supposition of any other. This view is in harmony with the rule that the court must cause all necessary parties to be brought in before proceeding with the trial. Code, § 122.

ARTICLE III.

PREFERENCE OF ISSUES.

Section 1. In general.

a. What issues preferred. Several statutes provide what causes or issues shall have a preference upon the calendar, and yet there is such a contradiction in the various sections that the court is left to exercise its discretion in most cases. By section 255 of the Code, issues of law have preference; while section 257 gives the preference to issues of fact to be tried by a jury, then next after that to issues of fact to be tried by the court, and lastly, to issues of law.

The rule as to circuit calendars has been laid down as follows: "At the *circuit* issues of fact to be tried by the jury should be placed *first* on the calendar in their order, according to the date

What issues preferred.

of their respective issues. Demurrers, and other issues of law, and issues of fact, to be tried by the court, should be placed by themselves, forming a *separate class*, as at special term, demurrers having the preference, and then other issues of law and issues of fact to be tried by the court last." 13 How. 345. Rule 48 provides that causes entitled to preference on the calendar shall, at the general term, be placed on a separate calendar.

There are some classes of cases which the statute declares shall have preference, and as to such cases no discretion is allowed, except as between several of such preferred actions.

Actions commenced against sheriffs in their official capacity, when brought in any court of record, are entitled to precedence after issue joined, over any and all other cases at issue in such court, not entitled by law to preference. Laws 1871, ch. 733, § 1.

In an action by a widow, for dower, when it is made to appear to the court, or a justice thereof, that she has no sufficient means of support aside from the property admeasured to her, etc. This preference extends to circuit, special or general term. Laws 1869, ch. 433, § 5.

So in actions in which executors and administrators are sole plaintiffs or sole defendants, and in actions for the construction of, or adjudication upon, a will, in which the administrators with such will annexed, or the executors of such will, are joined as plaintiffs or defendants with other parties, they will have a preference in the court of appeals and in the supreme court, at the general, special and circuit terms, over all actions except in criminal cases. Laws 1870, ch. 49.

Actions against corporations to enforce payment of their notes or other pecuniary obligations have a preference upon the calendar at general or special terms, or at the circuits, in all proceedings in such actions. Laws 1849, ch. 226, § 32.

Civil actions or proceedings in which the people of this State are a party, and where the attorney-general is the attorney on record are preferred. Laws 1858, ch. 37, § 1; Laws 1850, ch. 128; Code, § 13.

If there are both issues of law and of fact joined in an action, the issues of law must be first tried unless the court otherwise directs. Code, § 251.

When issues of both kinds are brought to trial, and the issues of fact are first tried without objection, this will be considered as

a trial by the direction of the court. *Warner v. Wigers*, 2 Sandf. 635; *Fry v. Bennett*, 9 Abb. 45, 50; 3 Bosw. 200.

Whenever the cause is moved for trial the court will determine whether the issue of fact shall or shall not be first tried, and no previous order upon the subject is necessary. *Ib.*

b. Calendar practice. The court has control over its calendar, and the right to regulate the order of trying causes, except in those instances where some statute declares that specified causes shall have preference. *Maretzek v. Cauldwell*, 4 Rob. 666.

In determining whether the issues of law or those of fact shall be first tried, the rule of the Code, section 251, that the issues of law shall be first tried, is a good one to follow. And this is especially true where such issues of law go to the entire cause of action. See *Wright v. Williams*, 2 Wend. 632; *Booth v. Smith*, 5 id. 107; *Overseers of Pittstown v. Overseers of Pattsburgh*, 15 Johns. 398. Although the plaintiff obtains a verdict upon the issues of fact, yet if the issues of law are decided against him he will be subjected to the costs of the trial of the issues of fact as well as those of law. *Ib.*

ARTICLE IV.

TRIAL OF THE ISSUES IN THE ACTION.

Section 1. In general.

a. Trial of issues of law. The place of trial has been noticed. Vol. 1, pp. 181 to 190.

Issues of law must be tried at a circuit court or special term. Code, § 255.

An issue of law must be tried by the court unless referred, as provided in sections 270, 271. Code, § 253. The practice on such trials will be hereafter explained.

b. Trial of issues of fact. The Code declares that the issues of fact joined in certain classes of actions must be by jury, unless a jury trial be waived under section 266, or be referred under sections 270, 271, viz.:

1. Actions for the recovery of money only;
2. Actions for the recovery of specific real or personal property;
3. Actions for a divorce from the marriage contract on the ground of adultery. Code, § 253.

Trial of issues of fact.

In any action which would formerly have been known as a common-law action, if an issue of fact is joined, such issue must be tried by a jury, unless a jury is waived, or it is referable because a long account is involved. *Hudson v. Caryl*, 44 N. Y. (5 Hand) 553; *Fire Department v. Harrison*, 2 Hilt. 455; 9 Abb. 1; 18 How. 181.

An action to abate a nuisance and to recover the damages which it has caused is one in which a jury trial is a matter of right. *Hudson v. Caryl*, 44 N. Y. (5 Hand) 553.

And, although the complaint is in form for equitable relief against the continuance of the nuisance, and, though the prayer for damages should be regarded as incidental thereto, yet, as the existence of the alleged nuisance and the amount of damages are questions which, before the constitution of 1846, were inquired of by a jury, such action must be considered as one of the causes in which a jury trial has heretofore been used. As to equitable relief by injunction, see Wait's Code, 384 *e*, 385 *f*, and *ante*, vol. 2, pp. 19, 20.

To authorize a compulsory reference, the action must arise upon contract; and where the action is founded upon tort, a jury trial is a matter of right. *Townsend v. Hendricks*, 40 How. 143. This is the rule even though the answer interposes a counter-claim which requires the examination of a long account. *Ib*.

Before a party can be deprived of the right to a trial by jury, on the alleged ground that the examination of a long account is involved, it must appear that the accounts to be examined are the immediate object of the suit or the ground of the defense; and they must be directly and not incidentally and collaterally involved. *Kain v. Delano*, 11 Abb. N. S. 29, 36.

In an action upon an agreement to insure and to deliver a policy, and where a loss occurs before the delivery of the policy, it is not necessary to compel a delivery of the policy before the plaintiff can recover the insurance, for he may maintain the action upon the agreement and the loss, and take judgment simply for the payment of the amount due. *Rockwell v. Hartford Fire Ins. Co.*, 4 Abb. 179. Such an action is one for the recovery of money only, and is to be tried by a jury. *Ib*.

The Code provides that, in other cases than those mentioned in section 253, every other issue is triable by the court, which, however, may order the whole issue, or any specific question of

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fact involved therein, to be tried by a jury ; or may refer it as provided in sections 270 and 271.

Upon the trial of issues of fact in an equity case, the court may, in its discretion, submit to the jury additional issues which arise upon the proof, and are material to the final determination. *Farmers and Mechanics' Bank v. Joslyn*, 37 N. Y. (10 Tiff.) 353 ; 4 Trans. App. 308.

Where issues of fact are joined in the cases embraced within section 254 of the Code, the court is to determine in all cases whether any or all of such issues shall be tried by a jury. *Church v. Freeman*, 16 How. 294 ; *O'Brien v. Bowes*, 10 Abb. 106 ; 4 Bosw. 657. But such election must be made by the court before the cause has been tried before it. *Ib.*

In a proper case the court will, on motion, order a trial by a referee. *Carr v. Wehrnan*, 2 Rob. 663.

c. *Waiver of jury trial.* A trial by a jury may be waived by the several parties to an issue of fact in actions on contract, and with the assent of the court, in other actions, in the manner following :

1. By failing to appear at the trial ;
2. By written consent in person or by attorney, filed with the clerk ;
3. By oral consent in open court, entered in the minutes. Code, § 266.

Where a jury trial is waived in the mode pointed out in this section, it will be valid and effectual ; and even without the aid of a statute, a party may, in a civil action, waive the benefit of a constitutional or a statutory provision which was made for his advantage. *Lee v. Tillotson*, 24 Wend. 337 ; *Detmold v. Drake*, 46 N. Y. (1 Sick.) 318 ; *Vose v. Cockcroft*, 44 N. Y. (5 Hand) 415, 423.

A party who has a right to insist upon a trial by jury may waive it by voluntarily trying the cause before the court without a jury, and without objection. *Pennsylvania Coal Co. v. Delaware and Hudson Canal Co.*, 1 Keyes, 72 ; *Greason v. Keteltas*, 17 N. Y. (3 Smith) 491, 498 ; *McKeon v. See*, 4 Rob. 449, 464, 465.

But there must be an intention to waive a jury trial, or the acts of the party must be such as to amount to a waiver within the statute, or the right to a jury will continue. In an action upon a foreign judgment, where the issue raised by the answer

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amounts to a plea of *nul tiel record*, this is an issue of fact, and the court cannot regularly try it upon a motion for judgment, as such issue should be tried by a jury. *Fasnacht v. Stehn*, 5 Abb. N. S. 338; 53 Barb. 650.

Merely excepting to the finding of facts and the conclusions of law will not amount to a waiver of a trial by jury, nor estop the defendant from insisting upon an appeal that the trial was irregular. *Ib.*

A failure of one of several defendants to appear on the trial does not compel the plaintiff to abandon his right to have the damages assessed by a jury. *Hendricks v. Carpenter*, 4 Rob. 665.

But if all the defendants fail to appear on the trial, the plaintiff may waive a jury and take an inquest before the court. *Haines v. Davis*, 6 How. 118; 1 Code R. N. S. 407. This ought to be done before the jury have been discharged for the circuit. *Ib.*; *Dickinson v. Kimball*, 1 Code R. 83.

ARTICLE V.

SEPARATE TRIALS BETWEEN DIFFERENT PARTIES.

Section 1. When a separate trial will be allowed.

a. In general. A separate trial between a plaintiff and any of the several defendants may be allowed by the court whenever, in its opinion, justice will thereby be promoted. Code, § 258.

It will be observed that this right to grant a separate trial is limited to the case of a plaintiff and any of the several defendants. This section does not provide for a separate trial between several defendants. And, although section 274 of the Code authorizes a judgment which will determine the ultimate rights of the parties on each side, as between themselves, yet it does not extend to a case in which separate defendants wish to litigate questions in which the plaintiff has no interest, and which ought to be the subject of a separate action. *Kay v. Whittaker*, 44 N. Y. (5 Hand) 565, 576.

Separate defendants can have no relief as against each other, unless it is in a case in which they have appeared and answered, in reference to a claim made against them by the plaintiff, and as a part of that claim; and separate relief must be based upon the

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facts involved in and brought out by the litigation and investigation of that claim. *Ib.*

In such a case where all the parties are before the court, and where all have been heard, and all the facts are properly before the court, the rights as between plaintiff and defendants not only, but as between the parties on either side, can be adjusted. *Ib.* See *Mechanics & Traders' Saving Institution v. Roberts*, 1 Abb. 381; *Woodworth v. Bellows*, 4 How. 24; 1 Code R. 129; *Norbury v. Seeley*, 4 How. 73; 2 Code R. 47.

If the plaintiff could have maintained a separate action against any one of the defendants, upon the facts in the case, then a separate judgment may be entered, and it will be a case in which a separate trial may be allowed. *Harrington v. Higham*, 15 Barb. 525; *Brumskill v. James*, 11 N. Y. (1 Kern.) 294.

The order for a separate trial may be made at the circuit when the cause is brought on for trial, or it may be made at a special term; and if no formal order is made and entered, but a separate trial is permitted by the court, this will be sufficient. *Gurnee v. Hoxie*, 29 Barb. 547.

CHAPTER II.

TRIAL BY JURY

ARTICLE I.

PROCEEDINGS ON A TRIAL BY JURY.

Section 1. Origin of trial by jury.

a. In general. An extended history of a trial by jury is not expected in this place ; and yet a brief sketch will be both interesting and useful to the student. It is to the English system of jurisprudence and its history that we must resort for this information. The system itself is one that has frequently undergone changes more or less important. In the early practice the whole body of the freeholders assembled at the county court, or court of the hundred, or a certain number was selected by consent of the parties, under the presidency of the sheriff as the substitute for the earl, and disposed of the question as regards both law and fact ; none of them, so far as can be now discovered, being sworn ; their verdict was the judgment.

Under the next system, instead of proceeding before the whole body of the county, twelve persons from the vicinage were selected, by virtue of the king's writ, to give the verdict ; the persons so selected being duly sworn. The next modification was the selection of a certain number for the trial of particular actions in the king's court, namely, the grand assize and recognitions ; here the judgment, founded on the verdict, was given by the court.

In the proceedings in assizes the jury, or persons to whose decision the question was submitted, were the recognitors ; that is, they decided simply on their own knowledge or from tradition, and not upon evidence, and for this reason they were always selected from the hundred or vicinage in which the question arose. But as regards the inquests taken by what may be called the common juries, which were composed, not of knights only, but of other lawful men selected by the sheriff, though also selected from the vicinage, the rule was not so strict ; they might decide on the testimony of those who could speak to what they had seen or heard ; their verdict, therefore, was not liable

to the process of attaint. Such inquests were necessarily resorted to in many cases.

In the proceedings by jury trial it was necessary that twelve should concur ; therefore, in case of disagreement in proceedings by assize, others from the vicinage conversant with the matter were sought for and added to the recognitors or jury till a verdict by the requisite number could be obtained. The great difficulty of procuring a verdict of twelve caused, for a time, the verdict of the majority to be received ; but in the time of Edward III the necessity for an unanimous verdict of twelve was re-established.

In the reign of Henry III trial by recognitors *and by witnesses* joined together in one jury, came into use ; thus, in the case of a disputed deed, the witnesses to the deed were summoned together with the recognitors from the vicinage to try the question. In the 23d Edward III, the witnesses, instead of being summoned as constituent members, were *adjoined* to the recognitors or jury in assizes, to afford to the jury the benefit of their testimony, but without having any voice in the verdict. This is the first indication we have of the jury deciding *on evidence formally produced*, and it is the connecting link between the ancient and modern jury.

The jury, subject to the peril of attaint, might, if they chose, decide contrary to the testimony of the witnesses, as to which they were the sole judges ; they were still so far recognitors that they were to decide on their own knowledge, if they possessed any.

While the jurors were mere recognitors, the court exercised a very vigilant superintendence in examining each of the jurors separately, in doubtful cases, to see whether the knowledge of the facts, which the jurors by their verdict professed to have, were drawn from legitimate sources ; but this security failed, or at least was very difficult of application when the jurors might give their verdict on a balance of testimony. This appears to have occasioned another change in the mode of jury trial which was effected sometime before the 11th Henry IV, namely, that all the evidence on which it was intended that the jury should rely in forming their verdict should be given at the bar of the court ; so that the judges might have the opportunity of excluding from the consideration of the jury all evidence of a character that ought not to be permitted to influence their judgment.

Origin of trial by jury.

This effected a change in the mode of trying civil causes, the importance of which can hardly be too highly estimated. Jurors from being, as it were, the mere recipients and depositaries of knowledge, exercised the more intellectual faculty of forming conclusions, from testimony, a duty not only of high importance with a view to truth and justice, but also collaterally in encouraging habits of reflection and reasoning (aided by the instructions of the judges), which must have had a great and most beneficial effect in promoting civilization.

The exercise of the control last adverted to on the part of the judges was the foundation of that system of rules in regard to evidence which has since constituted so large and important a branch of the law of England and of this country.

The practice of receiving evidence openly at the bar immediately led to another remarkable result, namely, the great extension of the duty of the advocate. In earlier times, upon criminal as well as civil inquiries, the jury, after they had been sworn and merely charged by the court as to the points at issue, retired to consult together in secret, without hearing either witnesses or counsel at the bar. But now the scene was totally changed; witnesses were examined and cross-examined in open court; the flood-gates of forensic eloquence were opened, and full scope given to the advocate to exercise his ingenuity and powers of persuasion on the jurors, to whose discretion the power of judging on matters of fact was now intrusted.

Another important consequence followed. When the jury in an assize gave, or were presumed to give, their verdict upon facts within their knowledge, if they came to a wrong decision they must usually have been guilty of perjury. When they became judges of the facts upon evidence, the liability to attain would have been as unreasonable and unjust as in the case of an ordinary jury; it therefore virtually fell into disuse. Thenceforth the means of correcting error and mistake on the part of the jury was left without adequate remedy in the courts of law until the seventeenth century, when the practice of granting new trials was introduced.

The last change in the institution of jury trial is of comparatively modern introduction. It is the limiting of the functions of the jury to that of being judges of fact upon the evidence laid before them. The principles which warrant this change are obvious. It was found that the cause of truth suffered more

 Right to jury trial in what cases.

from the prejudices which the residence of jurors in the neighborhood of the disputed facts were likely to engender, than was gained from knowledge and means of judging so acquired.

Other inconveniences arose from the rules as to the *venue*, so that, after various modifications as to the number of persons from the hundred or vicinage that were to be put upon the jury by the statute (4 and 5 Anne, ch. 16, and 24 Geo. II, ch. 18), the law requiring jurors to be returned from the vicinage or hundred was abolished in all civil actions, and it was directed that they should be summoned from the body of the county. By a decision in the court of queen's bench, in the first year of Queen Anne, it was held that, if a jury gave a verdict of their own knowledge, they ought so to inform the court, that they might be sworn as witnesses. This, and another case in the reign of George I, put an end to all remains of the ancient functions of juries as recognitors. The question, therefore, when did the trial by jury begin? admits of no definite answer, otherwise than by referring to the different transitions to which allusion has been made. See 1 Spence's Eq. Jur. 112, 113, 128, *note*; 3 Bl. Com. 349-366; 3 Broom & Had. Com. 355-361.

The right to a jury trial, and the mode of trial in this State, has always been substantially as at present; and it is the object of the present chapter to give that practice in full.

b. Right to jury trial in what cases. This subject has already been noticed. *Ante*, 9, 10, 11.

It is important to remember the distinction which existed under the former practice in relation to trials at law, and those in equity. It has been seen that in actions at law the general rule was that issues of fact were tried by jury (vol. I, 14, 15), while such issues were tried by the court in equity cases. Vol. I, 20, 21.

And, notwithstanding the union of the two systems of law and equity under the same jurisdiction, it was intended to retain the same mode of trial under the present system; and, as a general rule, a jury trial is proper in all cases in which the recovery of money is claimed by way of damages for the breach of any contract, express or implied, or for the damages resulting for any tort or wrong. Such actions may be for the recovery of money due upon bills of exchange or promissory notes, or bonds, or for the price of property sold, or for services rendered, or for the non-performance of a contract, and in like cases *ex*

When jury trial not a matter of strict right.

contractu. So, too, in cases where damages are claimed in actions for torts or wrongs, as in cases of assault, battery, slander, libel, malicious prosecution, trespass, trover or replevin, or in ejectment, or in any similar common-law action for a tort, including actions for a divorce on the ground of adultery. Code, § 253.

In an action of ejectment which involves, as one of the questions, the reformation of a contract, this question ought to be tried by the court, while the other issues of fact are to be tried by a jury. *Olendorf v. Cook*, 1 Lans. 37, 42.

Where a complaint contains a count for the improper sale of a pledge, joined with a count for the redemption of the pledge, and the facts proved do not entitle the plaintiff to the equitable relief claimed, the court may order the issues for the tort to be tried by a jury at the circuit. *Genet v. Howland*, 45 Barb. 560; 30 How. 360.

An action to recover penalties for a violation of the fire laws of a city is one to be tried by a jury. *Fire Department, etc., v. Harrison*, 2 Hilt. 455; 9 Abb. 1; 17 How. 273; 18 id. 181.

As to the actions which involve the examination of a long account, and in which a reference may be ordered. See Reference.

Where the action is one in which a jury trial is a matter of right, it will be error in the court to refuse such a trial. *Greason v. Keteltas*, 17 N. Y. (3 Smith) 491, 498; *Townsend v. Hendricks*, 40 How. 143, 161 to 164. No previous order for such a trial is required, as upon due notice of trial, and a proper filing of a note of issue, the clerk will insert the cause upon the calendar.

Besides these issues of fact which are triable by jury as a matter of right, the court has the power to order any other issue of fact to be tried by a jury. So that nearly all questions of fact may be tried by a jury if such is the will of the court. Code, § 254. There are certain issues involving accounts, and questions of fact which arise in the course of the action, but not upon the pleadings, which may be referred. Code, §§ 271, 272.

c. When jury trial not a matter of strict right. As has been just stated, a jury may be impaneled to try nearly every issue of fact in the action, if the court shall so order. But, in those actions which were formerly tried in a court of equity, the court may, and frequently does, dispense with the aid of a jury. The right to a jury trial is to be determined by the court, and the parties have no absolute control over the matter. *Church v.*

Advantages and disadvantages of jury trials.

Freeman, 16 How. 294; *McCarty v. Edwards*, 24 id. 236. See, also, *O'Brien v. Bowes*, 10 Abb. 106; 4 Bosw. 657; *Wilson v. Forsyth*, 16 How. 448. Where issues of fact in an equity case are tried by a jury, the court may submit to the jury such additional issues of fact as may arise upon the proofs when they are material to the final determination of the case. *Farmers & Mechanics' Bank v. Joslyn*, 37 N. Y. (10 Tiff.) 353; 4 Trans. App. 308.

An equitable action to set aside a conveyance, on the ground of fraud, is one which the court may try, or it may order a jury trial, which, however, will not be done when the circuit calendar is crowded with business. *McMahon v. Allen*, 10 How. 384; *Draper v. Day*, 11 id. 439.

In actions of *quo warranto*, the issues of fact are properly triable by the court, though the court may order the whole or any of the issues to be tried by a jury. *People v. Albany & Susquehanna R. R. Co.*, 7 Abb. N. S. 265; 1 Lans. 308; 55 Barb. 344; 38 How. 228; 2 Lans. 459; 57 Barb. 204.

In an action to charge the separate estate of a married woman, the action is an equitable one, triable by the court without a jury. *Cheseborough v. House*, 5 Duer, 125.

There are many questions which arise in equity causes in which the investigation of some matter of fact becomes important before a judgment can be properly rendered or entered, and in such cases a reference is ordered. See Interlocutory Decrees and Orders. Code, §§ 246, 271, subd. 2.

In equity practice, the court frequently referred a part or all of the issues of fact for trial by a jury, and this power is continued by the Code, §§ 254, 271, 246, subd. 2. A reference may be ordered instead of a jury trial if the court prefers that mode of trial. *Ib.*

d. Advantages and disadvantages of jury trials. This subject is sufficiently noticed in a subsequent chapter. See Reference.

Section 2. The settlement of issues of fact for trial.

a. When not necessary. In actions for the recovery of money only, or for the recovery of specific real or personal property, it is not necessary nor is it proper, to apply for the settlement of special issues for trial. The issue joined by the service of the several pleadings raises and presents the issues to be tried. So when the trial is by the court, instead of a jury, no special

Settlement of issues, when necessary — Application for settlement of issues.

issues need be settled. In equity cases, in which the issues and matters to be decided may be very complicated, the court can readily dispose of them upon the evidence and the law of the case.

But such complicated issues could not be understood or remembered by a jury, and, therefore, all matters submitted to them upon special issues in such actions are reduced to the simplest form, and one admitting a direct affirmative or negative, or at least of a brief finding.

b. Settlement of issues, when necessary. In cases where the trial of issues of fact is not provided for in section 252 of the Code, if either party desires a jury trial an application must be made to the court to settle such issues, which application will, in a proper case, be granted, and the issues will be settled by the court, or a judge, or by a referee appointed for that purpose. Sup. Ct., Rule 40. As has been already stated, the right to try such issues by a jury is entirely discretionary with the court. *Ante*, 9, 10, 11. The number of instances in which the court *may* order such issues to be tried by a jury, or by a referee, is very great. It includes all issues not embraced in section 253 of the Code. Code, § 254.

The former equity practice of awarding and trying feigned issues has been abrogated, but all the cases in which such an issue could have been made under that practice, and all cases of questions of fact not put in issue by the pleadings may now be tried upon an order made, which distinctly and plainly states the question to be tried. Code, § 72; Sup. Ct., Rule 40.

In actions for a divorce on the ground of adultery, the issues of fact upon the questions of adultery to be tried by a jury must be settled before the cause can be noticed or tried in that mode. Sup. Ct., Rule 40; *Leslie v. Leslie*, 11 Abb. N. S. 311. The case of *Parker v. Parker*, 3 Abb. 478, was decided before the present rule of court. See 1 Van Sant. Eq. Pr. 265.

c. Application for settlement of issues. In cases where the trial of issues of fact is not provided for in section 253 of the Code, if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion to be made upon the pleadings, that the whole issue, or any specific questions of fact involved therein, be tried by jury. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial, and

Form of the issues to be tried.

in proper form, to be incorporated in the order ; and the court or judge may settle the issues, or may refer it to a referee to settle the issues. Such issues must be settled in the form prescribed in section 72 of the Code of Procedure. Sup. Ct., Rule 40.

Although rule 40 requires the application for a jury trial to be made within ten days after issue joined, the court may, notwithstanding this rule, hear and grant the application after this time. *Clark v. Brooks*, 26 How. 285. As to deviating from the rules, see vol. 1, 462, 463.

The motion may be made by any of the parties to the action, though, if there are several defendants who are united in interest, it ought to be made by all so united, and notice of the motion ought to be given to the attorneys of all the other parties who have appeared in the action.

Where there is no opposition to the motion, the order will be granted as of course ; and, in that case, the moving party will insert in the order the questions of fact as they were served with the notice of motion.

If the opposite party is not satisfied with the form of the questions of fact proposed, or if he does not desire a jury trial, he may appear and oppose the motion.

Where the objection relates merely to the form of the questions of fact proposed, the court will settle the issues, or refer them to a referee for settlement. The objecting party will present such issues as he deems proper at the time of settling such issues of fact.

If a reference for the settlement of the issues is ordered, it ought to be duly drawn up and entered, and due notice given of the time and place of settlement by such referee. The referee will report the issues as settled by him, and his report should be filed, and a copy of it, together with a copy of the order directing what issues shall be tried, served on the opposite party. The power of the court to order the trial of issues of fact upon its own motion has been noticed. *Ante*, 10, 11.

d. Form of the issues to be tried. The fortieth rule of the supreme court provides, that the issues must be in the form prescribed in section 72 of the Code. That section requires that the questions of fact to be tried shall be stated distinctly and plainly. The order for such trial is all the authority necessary. Code, § 72.

Notice of motion for issues to be tried by a jury.

Notice of motion for issues to be tried by a jury.

(Title of cause.)

SIR — Please take notice that a motion will be made at the next special term of this court, appointed to be held at, etc., on, etc., at the opening of the court on that day, or as soon thereafter as counsel can be heard, that the issues (copies of which are hereto annexed and served) arising upon the pleadings in this action be settled, and the same ordered to be tried by a jury.

Yours, etc.,

(Dated, etc.) E. B., *Plaintiff's Attorney.*

To C. T. B., Esq., *Defendant's Attorney.*

Copy of issues proposed for jury trial.

(Title of cause.)

1. Were the plaintiff and the defendant, partners in the grocery trade, on the day of, etc.?

2. Did such partnership continue up to the day of, etc.?

Or, in a divorce case:

1. Did the defendant in this action commit adultery with one A. B., at, etc., on, etc.?

2. Was such adultery (if committed) condoned by the voluntary cohabitation of the plaintiff with the defendant after full knowledge of the fact of such adultery?

3. Is the plaintiff living in adulterous intercourse with one C. D., at the city of, etc., as alleged by the defendant in her answer?

4. How much more than five years elapsed since the fact of such adulterous intercourse came to the knowledge of the defendant, etc.?

E. B.,

Plaintiff's Attorney.

Order of reference to settle issues.

(At a special term, etc.)

(Present, etc.)

(Title of cause.)

On motion of E. B., attorney for the plaintiff, and after hearing C. T. B., attorney for the defendant, it is ordered that it be referred to D. McM., Esq., referee, to settle the issues arising upon the pleadings in this action, upon the several questions of fact proposed by the respective parties to this action.

Report of issues as settled by referee.

(Title of cause.)

The undersigned referee, to whom it was referred by an order in this action, bearing date the, etc., to settle the issues arising

Order directing issues to be tried by a jury — Trial of the issues of fact.

upon the pleadings in this action, respectfully reports the following (*or the annexed*) as the issues so settled by him on the several questions of fact proposed by the respective parties.

D. McM.,
Referee.

To this report the referee will annex the issues as he has settled them.

If the court settles the issues, and orders them to be tried by a jury, the order ought to be duly entered, and may be in the following form :

Order directing issues to be tried by a jury.

(*At a special term, etc.*)

(*Present, etc.*)

(*Title of cause.*)

Upon reading the pleadings in this action, and after hearing E. B. of counsel for the plaintiff, and C. T. B. of counsel for the defendant, it is ordered that the following issues of fact be tried by a jury at the proper circuit court. 1. (*State all the issues fully and distinctly as the court has settled them*), and all further directions are reserved until after the trial of said issues.

A copy of the order ought to be served upon the opposite party, either before or with the notice of the trial of such issues.

It has already been stated, that the court may order the trial of such issues of fact upon its own motion. *Ante*, 10, 11.

e. Trial of the issues of fact. When special issues of fact have been settled and ordered to be tried by a jury, they are brought to trial upon due notice in the same manner as any other issues of fact. And the trial is conducted in the same general manner as other jury trials. The verdict, however, ought to be so rendered as to answer fully and distinctly all the questions proposed in the issues. This may be done by directing the jury to respond to each question separately ; and if the issues are numbered, the findings may be readily applied to the proper issue.

The finding of the jury ought to be in writing, and be filed with the clerk and entered upon the minutes by him. Code, § 261.

A written finding, even when expressly directed by the court, may be waived by the parties, if they accept an oral finding, or a general verdict instead of a special one. *Moss v. Priest*, 19 Abb. 314 ; 1 Rob. 632.

Review of errors on the trial — Notice of trial.

The finding of the jury upon issues of fact in equitable actions is merely for the information of the court. *Wood v. Mayor, etc., of N. Y.*, 4 Abb. N. S. 152, 157; *Clark v. Brooks*, 2 id. 385, 406, 407; *Lansing v. Russell*, 2 N. Y. (2 Comst.) 563; *Candee v. Lord*, id. 269.

f. Review of errors on the trial. Whenever any such special or specific question of fact has been tried by a jury, or by a referee, the usual mode of making a case or exceptions, or a case containing exceptions, is the regular practice. Sup. Ct., Rule 40.

It is important that a new trial should be moved for, unless the party is willing to permit the finding to stand as a final one in the case. *Ib.*

The motion should, in the first instance, be made at the special term. *Ib.* As to the former practice see *Snell v. Loucks*, 12 Barb. 385.

No appeal lies from an order settling issues of fact in an equitable action for the purpose of having them tried by a jury. *Wood v. Mayor of N. Y.*, 4 Abb. N. S. 152, 157; *Clark v. Brooks*, 2 id. 385, 406, 407.

Section 3. Notice of trial.

a. In general. A notice of trial of some kind is, in general, indispensable to the regular trial of an action. A formal technical notice may not be in all cases required, as in the case of a mutual consent to try the cause, and an actual trial in pursuance of the agreement; for, in that case, neither party would be permitted to allege the want of a written notice.

The Code has express provisions in relation to a notice of trial. Code, §§ 256, 258, 412, 417.

Although the parties may bring an action to trial upon a stipulation, or by consent, and though such trial may be held regular, yet the only correct practice is to give due and regular notice. In most cases this notice is the only mode of getting the cause tried, as one party or the other may not be ready or willing to bring the trial on. It frequently happens that a cause is not reached at the circuit for which it was noticed. In such case a new notice is necessary for the next circuit, if it is desired to try the cause at that time. And this notice must be renewed as often as the cause may go over the regular term or circuit. Either party giving the notice may bring the issue to trial. Code, § 258. At any time after issue, and at least four-

 Notice of trial.

teen days before the court, either party may give notice of trial. Code, § 256. See, also, § 412.

These sections evidently contemplate a notice of trial for each and every circuit at which either party may attempt to bring the action to trial.

If the cause is put over the term, a new notice of trial is necessary. And, under the former English practice, this was the case even when the trial was set down for a certain day or term. *Ellis v. Trusler*, 2 W. Bla. 798; *Ifield v. Weeks*, 1 H. Bla. 222; *Cawley v. Knowles*, 16 C. B. N. S. 107; *Jacks v. Mayer*, 8 T. R. 245; *Gains v. Bilson*, 4 Bing. 414; 1 M. & P. 87; *Shepherd v. Butler*, 1 Dowl. & Ryl. 15.

If a cause was made a *remanet* at the assizes a new notice was necessary for the next assizes. *Gains v. Bilson*, 4 Bing. 414; 1 M. & P. 87. So where a cause was postponed by a rule of court. *Shepherd v. Butler*, 1 Dowl. & Ryl. 15; *Jacks v. Mayer*, 8 T. R. 245. If the cause was made a remanet to the next sittings or assizes, by an order of *nisi prius*, a new notice was not necessary. *Ib.*

In a late case, where a defendant had obtained a postponement from one sitting to the next, by virtue of a judge's order, a new notice for such sittings was not required. *Claudet v. Prince*, L. R., 2 Q. B. 406; 8 B. & S. 360. But see *Cawley v. Knowles*, 16 C. B. N. S. 107, which required a notice. As to the effect of an injunction upon a notice of trial, see *Stockton & Darlington Railway Co. v. Fox*, 6 Exch. 127; 2 L. M. & P. 141; 20 L. J. Exch. 96.

A notice of trial in due time, according to the practice of the court, is regular, although a previous notice has been given which is void, and has not been countermanded. *Fell v. Tyne*, 5 Dowl. P. C. 246; 2 H. & W. 299.

On a new trial, a fresh notice of trial is necessary. *Bingly v. Mallison*, 3 Doug. 402.

There must be an *issue* to authorize a notice of trial, and where the only defense is a set-off or counter-claim, the cause ought not to be noticed for trial. *Pardee v. Schenck*, 11 How. 500. An application for judgment under section 246 of the Code is the proper practice. *Ib.*

A mere agent who is not a regularly admitted attorney cannot give a proper notice, nor act as attorney. *McKoan v. Devries*, 3 Barb. 196; 1 Code R. 6; 6 N. Y. Leg. Obs. 203; *Bullard v.*

By whom notice of trial may be given.

Van Tassell, 3 How. 402; *Weir v. Slocum*, id. 397; 1 Code R. 105. So of a notice given by one who has ceased to be an attorney. *Patterson v. Powell*, 9 Bing. 620; S. C., 2 M. & S. 773.

b. By whom notice of trial may be given. Notice of trial may be given by either party. Code, §§ 256, 258. It is the duty of the plaintiff, in all cases, to notice the cause and bring it on for trial. And if he unreasonably neglects to proceed in the cause the court may dismiss his complaint. Code, § 274.

The defendant may notice the cause and bring it to trial, although he is not under any obligation to do so. He may omit to give such notice, and may, if the plaintiff unreasonably neglects to proceed in the action, move at a special term for a dismissal of the complaint for that cause. *Bowles v. Van Horne*, 11 Abb. 84; 19 How. 346; *Roy v. Thompson*, 1 Duer, 636; 8 How. 253; *Carter v. Clark*, 2 Sweeny, 189; *Perkins v. Butler*, 42 How. 102; *Corbett v. Clafin*, 17 Abb. 418. See Dismissal of Complaint, vol. 2, 608 to 611. The cases of *Moeller v. Bailey*, 14 How. 359, and *Winchell v. Martin*, 14 Abb. N. S. 47, which hold, that a failure of the plaintiff to notice the cause for trial, and the trial of later issues, is no ground for dismissing the complaint, does not seem to give full effect to section 274 of the Code, which provides that an unreasonable neglect to proceed in the cause is a ground of dismissal. Now, a notice of trial and a trial are both proceedings in an action, and an unreasonable neglect by the plaintiff in relation to them is plainly within the letter and the spirit of the statute, independently of any rule of court.

If the defendant desires nothing more than a dismissal of the complaint, a motion for that purpose will be sufficient in a proper case for the motion.

But if the answer claims, and the defendant seeks affirmative relief, then the proper course will be to notice the cause for trial, and such relief may be obtained if the law and the facts warrant such a judgment. *Roy v. Thompson*, 8 How. 253; 1 Duer, 636; *Wilson v. Wheeler*, 6 How. 49; 1 Code R. N. S. 402.

Where there are several defendants, and the defenses are identical, the notice of trial ought to be given by all the defendants. But where there are several defendants, each of whom has a distinct and separate defense, and where they appear by separate attorneys each defendant may notice the cause, and, by the permission of the court, may bring the cause to trial and take a dis-

 Notice of trial, to whom given.

missal of the complaint, or a separate judgment, if the plaintiff fails to appear. *Gurnee v. Hoxie*, 29 Barb. 547; *Bishop v. Morgan*, 1 Code R. N. S. 340; *Bridgeford v. Wiseman*, 16 Mees. & Wels. 439; *Haddrick v. Heslop*, 12 Q. B. 267, 928; 11 Jur. 1012; 16 L. J. Q. B. 442; *Rhodes v. Thomas*, 2 D. & L. 553; *Sawyer v. Hodges*, 1 D. N. S. 16.

c. Notice of trial, to whom given. Generally, a notice of trial is given by the plaintiff to the defendant, or by the defendant to the plaintiff. If there are several defendants who have appeared in the action, a notice of trial must be given to all, although but a part of them put in answers. *Tracy v. N. Y. Steam Faucet Co.*, 1 E. D. Smith, 349; *Ward v. Dewey*, 12 How. 193.

The Code, section 274, which permits the court to determine the rights of the parties as between themselves, is limited to cases which grow out of claims by the plaintiff against the defendants, and not to a case in which the defendants make claims against each other, in which the plaintiff has no interest. *Kay v. Whitaker*, 44 N. Y. (5 Hand) 565, 576. See vol. 2, 476. In such a case a notice of trial given by one of the defendants to another would be useless, as the court would not try such claims made between defendants. See, also, *Decker v. Judson*, 16 N. Y. (2 Smith) 439, 450, in opinion; *Stephens v. Hall*, 2 Rob. 674, 676; *Mechanics & Traders' Savings Institution v. Roberts*, 1 Abb. 381; *Wells v. Smith*, 7 id. 261, 263; *Norbury v. Seeley*, 4 How. 73. And if the court would hear such claims, there ought to be statements in the nature of pleadings between the defendants. *Decker v. Judson*, 16 N. Y. (2 Smith) 439, 450; *Stephens v. Hall*, 2 Rob. 674, 676.

When the defendant appears by attorney, the notice must be served upon him. Code, § 417. And, if there are several defendants who appear by separate attorneys, the notice must be served upon each of such attorneys. *Attorney-General v. Stevens*, 3 Price, 72. But when the attorney of either party has become a non-resident of the State, the service of a notice upon him is irregular. *Dieffendorf v. House*, 9 How. 243. See 2 R. S. 287 (296), § 67. If, however, the attorney resides in a State adjoining this, and his office for the transaction of law business is in this State, the statute declares the mode of service thus: "Provided, that service of papers which might, according to the practice of the courts of this State, be made upon said attorney at his residence, if the same were within the State of New York,

At what time notice of trial is to be given.

shall be sufficient, if made upon him by depositing the same in the post-office in the city or town wherein his said office is located, directed to said attorney at his office, and paying the postage thereon, and such service shall be equivalent to personal service at the office of such attorney." Laws 1866, ch. 175, § 1, which repeals Laws 1862, ch. 43.

d. At what time notice of trial is to be given. Notice of trial may be given at any time after issue has been joined, but at least fourteen days before trial when personally served (Code, § 256), or sixteen days when served by mail. Code, § 412. Before a notice of trial can be properly served there must be issues joined between the plaintiff and the defendant. Code, § 256. See the cases cited *ante*, 3 to 6. If some of the defendants serve answers and an issue is joined, and some of the defendants do not put in answers but serve a notice of appearance, the cause may be regularly noticed after the time to answer has expired as to such defendants. See *ante*, 3 to 6; see, also, Code, § 246, subd. 2.

The notice of trial may be served as soon as the issue is complete, but it will be subject to the right to amend the pleadings; and the service of an amended pleading by the opposite party, in good faith, may render the notice of trial useless. *Cusson v. Whalon*, 5 How. 302; 1 Code R. N. S. 27; *Evans v. Lichtenstein*, 9 Abb. N. S. 141; *Washburn v. Herrick*, 4 How. 15; 2 Code R. 2; *Morgan v. Leland*, *id.* 123. So the service of a demurrer may have the same effect. *Hawley v. Hanchet*, 1 Cow. 152. See, also, *Miller v. Stocking*, 22 Wend. 625; *Shultys v. Owens*, 14 Johns. 345.

In actions for a divorce for adultery the issues must be settled before the cause can be noticed for trial or put upon the calendar. *Leslie v. Leslie*, 11 Abb. N. S. 311; Sup. Ct. Rule 40.

Although the issues ought to be complete before notice of trial, yet the court may amend the pleadings at the trial so as to obviate the objection when no injustice will be done to either of the parties. *Berresford v. Geddes*, L. R., 2 C. P. 285. In the case last cited there were two counts in the declaration, and issues were joined as to the first count. No issue was joined on the replication to the plea to the second count, and upon the trial the court, on the plaintiff's motion, struck out that count although the defendant objected, but the ruling was sustained. See, also, Code, § 176.

A notice of trial served by mail may be made sixteen days

For what term or time the cause ought to be noticed.

before the trial, including the day of service, and such service is valid, although the sixteenth day falls on Sunday before the Monday for which the cause is noticed. *Central Bank of Westchester Co. v. Alden*, 41 How. 102. Therefore a service made by mail, on the fourth day of the month, for trial on Monday, the twentieth, is good. *Ib.*

e. For what term or time the cause ought to be noticed. Issues of fact to be tried by a jury are to be noticed for trial at a circuit court to be held in the county named in the complaint as the place of trial. If the place of trial has been changed, then the notice must specify the county to which the cause has been transferred for trial. Code, § 126. Causes may be noticed for an adjourned circuit or county court, in the same manner as though held by original appointment. Code, § 24. A plaintiff is bound to notice a cause for an adjourned circuit, in the same manner that he would be required to give notice for a regular circuit. *Parkins v. Stephenson*, 10 Wend. 620.

In case of malignant epidemic diseases at the place and time appointed for holding court, the place of trial may be changed by the judge; and all causes noticed for the place originally appointed, will be heard at such adjourned place and the notices will apply to that place. Laws 1866, ch. 174.

The notice of trial should be for the the first day of the term at which it is intended to try the cause; and the cause may be moved for trial whenever regularly reached during that term. The whole period of a term or circuit is regarded as but one day, and any recovery or other proceedings had therein will be held to relate to, and to have been had at or on, the first day of the circuit or term. *Manchester v. Herrington*, 10 N. Y. (6 Seld.) 164.

f. Short notice of trial. The court sometimes grants a favor to a defendant, such as relieving him from some default or omission, and a condition is frequently imposed that he shall accept short notice of trial. In the English practice short notice means a notice of four days. Reg. Gen., 1 El. & Bl., App. ix. And in an early case in this State a notice of four days was held to be a short notice. *Cheetham v. Lewis*, 2 Johns. 105. A short notice is defined to be a notice of less than the ordinary time; generally of half that time. Burr. Dict. Half the usual notice is said to be proper. 1 Paine & Duer's Pr. 459. If that rule prevails, a notice of seven days would now be required if the service is personal, or a notice of eight days by mail. All questions

Omitting to notice cause for trial.

as to time can be avoided by specifying the length of time in the order imposing the terms of short notice.

Where the defendant is under terms of taking short notice of trial it is usual to give as long a notice as the time will permit. 1 Archb. Pr. 314, 12th ed.; Tidd, 757, 9th ed. The defendant is not bound to take short notice when the plaintiff has sufficient time to give full notice. *Nicholl v. Forshall*, 15 L. J. Q. B. 203; *Woolley v. Aldritt*, 17 L. T. N. S. 120.

Where the defendant is under terms of taking short notice of trial, *if necessary*, it lies upon the plaintiff to show the necessity of a shorter notice than the ordinary one. *Drake v. Pickford*, 15 Mees. & Wels. 607; 15 L. J. Exch. 340.

Where the defendant is under terms of taking short notice for a particular circuit or term, he is not obliged to take short notice for any subsequent circuit or term. *Slatyer v. Painter*, 8 Mees. & Wels. 672; 1 D. N. S. 35; 5 Jur. 636; *Dignam v. Mostyn*, 6 Dowl. 547; *Abbott v. Abbott*, 7 Taunt. 452; 1 Moore, 160; *White v. Clarke*, 8 Dowl. 730.

So if the defendant is required to take short notice of trial he is not bound to take short notice of inquiry. *Blaaw v. Chaters*, 6 Taunt. 458; *Stevens v. Pell*, 2 Dowl. 355; 2 C. & M. 421; 4 Tyrw. 267. Nor need he take less than the usual notice of countermand. *King v. Jones*, 1 Dowl. 640; 1 C. & M. 71; *Doncaster v. Cardwell*, 5 Dowl. 582; 2 M. & W. 391.

Sometimes the defendant will be put under terms of taking less than four days' notice of trial. *Lawson v. Robinson*, 2 Dowl. 69; 1 C. & M. 499; 3 Tyrw. 490.

A defendant is not under any obligation to take short notice of trial unless the court or a judge has imposed such terms or conditions.

g. Omitting to notice cause for trial. It is important to either party to notice the cause if he desires to bring it on for trial. If the plaintiff omits to notice the cause he will not be permitted to move it for trial, even though the defendant may have noticed and put it on the calendar. It is the party who gives the notice that is entitled to bring on the issues for trial. Code, § 258.

Beside this it has been seen, *ante*, 26, that the plaintiff's complaint may be dismissed for a neglect to notice it.

It is equally important that the defendant should notice the cause if he would bring it on for trial, or would dismiss the com-

Omitting to notice cause for trial.

plaint. See Code, § 258. The rule of practice is, that neither party can move the cause for trial unless he has properly noticed it. And if no notice of trial is given, or the notice is irregular and insufficient, and the plaintiff proceeds with the trial, and takes a verdict, in the absence of the defendant, the court will, on the application of the latter, set the verdict aside. *Jenks v. Payne*, 15 Johns. 399; *Williams v. Williams*, 2 Dowl. 350; *Wright v. Carr*, 2 Jur. 516; *Cotton v. Thompson*, 5 id. 270; *Nicholl v. Forshall*, 15 L. J. Q. B. 203; *Shepherd v. Thompson*, 9 Mees. & Wels. 110; 1 Dowl. N. S. 345.

Where the notice is defective, or the service of it irregular, the irregularity may be waived; and if the defendant appears and defends the action, this will waive the defect, or even the want of a notice. *Doe d. Antrobus v. Jepson*, 3 B. & Ad. 402; *Fraas v. Paravicini*, 4 Taunt. 545; *Gillingham v. Waskett*, McClel. 198; 13 Price, 484; *Younge v. Fisher*, 4 M. & G. 814; 2 Dowl. N. S. 637; 5 Sc. N. R. 893. A few of the English cases may, perhaps, be usefully noticed in this place.

Where there is a defect in a notice, and a motion is made to set the notice aside on another ground, and the motion is denied, it will be a waiver of the defect. *Farmer v. Mountfort*, 9 Mees. & Wels. 100; 1 Dowl. N. S. 366. So, where a motion is made to strike a cause from the calendar for an alleged defect in the notice, and the motion is heard by the court and denied, this will waive the irregularity. *Younge v. Fisher*, 4 M. & G. 814; 2 Dowl. N. S. 637.

But the defendant is not bound, by the English practice, to return an irregular notice, and, therefore, he will not waive the irregularity by simply retaining it. *Dignam v. Ibbotson*, 3 Mees. & Wels. 431; *Dignam v. Mostyn*, 6 Dowl. 547.

He need not return such notice, though made aware, by a notice to produce, that the plaintiff is proceeding thereon. *Wood v. Harding*, 3 M., G. & Scott, 968.

The practice in this State requires an irregular or defective notice to be immediately returned, or the irregularity will be waived. *Silliman v. Clark*, 2 How. 160; *N. Y. Central Ins. Co. v. Kelsey*, 13 id. 535.

In relation to a waiver by appearing and objecting to a notice, it may be remarked that an appearance in pursuance of a notice of motion, which was not served for a sufficient length of time before the hearing, is no waiver of the defect, if the objection is

Plaintiff must move cause if noticed — Notice by defendant, what to contain.

raised on the argument. *Rogers v. McElhone*, 20 How. 441 ; 12 Abb. 292.

If the objection is not taken at the hearing, it cannot be raised afterward. *Main v. Pope*, 16 How. 271. As to waiver by receiving or acting upon papers, see *Sherman v. Gregory*, 42 How. 484, and cases cited ; Wait's Code, 771 c.

h. Plaintiff must move cause if noticed. If a plaintiff notices a cause for trial, he is bound to move it when reached, or the complaint may be dismissed for neglect to proceed in the action. *Bishop v. Morgan*, 1 Code R. N. S. 340. And if notice is served upon one of two defendants severally liable, the defendant so served may move for judgment of dismissal. *Ib.* And see *Lomer v. Meeker*, 25 N. Y. (11 Smith) 361, 363, 364.

i. Notice by defendant, what to contain. In many respects the notice of trial is similar, whether served by the plaintiff or the defendant. In a notice by the plaintiff it is stated that an *inquest* will be taken. Such a statement would be improper in a notice served by the defendant. His notice should state that he will move for a *dismissal of the complaint* with costs, or for a judgment by default.

If the notice does not contain such a statement, or an equivalent one, the court may deny him leave thus to proceed on the trial ; and besides this, without such a notice the defendant will not be able to avail himself of any affirmative relief or judgment which may be claimed in the answer, and which he might have obtained upon a proper notice.

There are several instances in which the defendant seeks important affirmative relief ; as in replevin, where he claims a return of property. *Schroeder v. Kohlenback*, 6 Abb. 66. Or, where he interposes a set-off, and claims a balance ; or, where a counter-claim entitles him to a judgment in his favor. A proper notice will secure a hearing upon these points ; while a mere special motion to dismiss the complaint, as in the case of non-suit, will not entitle him to any relief but such dismissal. *Roy v. Thompson*, 8 How. 253 ; 1 Duer, 636 ; *Wilson v. Wheeler*, 6 How. 49 ; 1 Code R. N. S. 402.

j. When notice cannot be properly given. There are many instances where the cause is not in a condition to be brought to trial, and while in that state there cannot properly be a notice of trial served. Many of the cases have been already cited,

The notice of trial and its requisites.

in noticing the time when an action may be brought to trial. *Ante*, 3 to 6.

k. The notice of trial and its requisites. The rules which apply to notices in general are equally applicable to notices of trial. See Notices, etc.

In the plaintiff's notice of trial, a clause is usually inserted to the effect that an inquest will be taken, and this clause was necessary under rule 29 of 1858. Such a clause seems to have been inserted in all the supreme court rules since 1808. See 3 Johns. 542; 1 Dunl. Pr. 589, 590; 1 Paine & Duer's Pr. 458, 459; Grah. Pr. 262, 263 (2d ed.); 1 Burr. Pr. 213 (2d ed). But the new rule, 36, omits the requirement that notice of taking an inquest shall be given. To insert such a clause can do no harm, although its omission would not, under the new rule, render the notice defective.

This rule clearly authorizes an inquest, while it dispenses with a notice that one will be taken.

There is no particular form requisite for a notice of trial, so long as it unequivocally conveys notice to the opposite party that the moving party intends to try the cause at a specified time and place. *Ginger v. Pycroft*, 2 B. C. Rep. 254; 5 D. & L. 554; 12 Jur. 898; 17 L. J. Q. B. 182.

The essential information required is that the party noticed shall know what particular cause is to be tried, and when and where. Where there are two actions pending between the same parties, and only one of them is noticed for trial, the notice ought to specify which action is intended, or it will be insufficient. *Lisher v. Parmelee*, 1 Wend. 22; see, also, *Towers v. Turner*, 4 D. & L. 177; *Flowers v. Welch*, 9 Exch. 272; 3 L. J. Exch. 72.

In determining whether a particular notice is sufficient, the court will ascertain whether the specified defect misled the complaining party.

A notice of trial for the third Monday, instead of the third Tuesday, where it appeared that the party noticed was not misled, was held sufficient, although the circuit was appointed for the third Tuesday. *Bander v. Corill*, 4 Cow. 60. So a notice for the third Tuesday, when the circuit sat on the third Monday, was held sufficient. *N. Y. Central Ins. Co. v. Kelsey*, 13 How. 535; *Wolfe v. Horton*, 3 Caines, 86. A notice for the fourth — day of April, instead of the fourth Monday of April, is good, when the attorney upon whom it is served retains it. *Silliman v. Clark*, 2 How.

Forms of trial — Notice of trial — General.

160. A notice for the next term, to be held at a specified place, is good, although it specifies a wrong day, as it cannot mislead, and the wrong day will be rejected as surplusage. *Jackson v. Brownson*, 4 Cow. 51. So if a notice, which states the day of the month correctly, but not the day of the week. *Wolfe v. Horton*, 3 Caines, 86. A mistake in spelling the name of one of the parties, as *Jeunis* for *Teunis*, is of no importance where the error cannot mislead. *Quick v. Merrill*, 3 Caines, 133. A party who desires to rely upon such defects ought to return the notice at once. *N. Y. Central Ins. Co. v. Kelsey*, 13 How. 535; *Silliman v. Clark*, 2 id. 160.

In noticing causes, printed blanks are generally used, but it will be convenient to have the usual forms in connection with the text.

Plaintiff's notice of trial.

(Title of cause.)

To D. McM.,

Attorney for Defendant:

SIR: Take notice that the above cause will be brought to trial, and an inquest taken therein, at the next circuit court appointed to be held in and for the county of _____, in the _____ of _____, on the _____ day of _____, 187 .*

Dated on the _____ day of _____, 187 .

Yours, etc.,

E. B.,

Attorney for Plaintiff.

Defendant's notice of trial.

(Title of cause.)

To E. B.,

Attorney for Plaintiff:

SIR: Take notice that the above cause will be brought to trial, at the next circuit court _____, appointed to be held in and for the county of _____, in the _____ of _____, on the _____ day of _____, 187 . And that a motion will then and there be made for a dismissal of the complaint with costs, or for such other relief as may be proper.

Dated the _____ day of _____, 187 .

D. McM.,

Attorney for Defendant.

Notice of trial — General.

(Title of cause.)

To E. B.,

Attorney for _____:

SIR: Take notice that this action will be brought to trial at

Admission of service—Service of notice of trial.

the next circuit court , appointed to be held in and for the
county of , in the of , on the day of , 187 .
Dated the day of , 187 .
Yours, etc.,
E. B.,
Attorney for .

Admission of service.

Due service of a notice, of which the (above or) within is a
copy, is hereby admitted.
Dated, etc. E. B.,
Attorney for .

*Plaintiff's notice of trial, and of assessment of damages
against a defendant who did not answer.*

(As in the preceding plaintiff's notice to the *, and then add)
and that the jury who try the cause will, at the same time, assess
the plaintiff's damages against the defendant, C. D., in this
cause.
(Date.) (Signature, etc.)

1. *Service of notice of trial.* The service may be personal,
or by mail; when personal, fourteen days' notice is required.
Code, § 256. When by mail, sixteen days, including the day of
service. Code, § 412. When either party appears in person,
the service may be made upon him. If he has an attorney, the
service must be made upon him. Code, § 417. If the defendant
does not demur or answer, service of notice or papers in the
ordinary proceedings in an action need not be served upon him,
unless he is imprisoned for want of bail, but must be served upon
him or his attorney, if notice of appearance in the action has
been given. Code, § 414. An injunction is not an ordinary
proceeding in an action, and therefore a defendant who has ap-
peared but not answered is not entitled to notice of an applica-
tion therefor. *Becker v. Hager*, 8 How. 68. But notice must be
given for an application to amend a summons. *Hewitt v. Howell*,
8 How. 346.

The mode of service is provided for in sections 409, 410, 411, in
ordinary cases. Where a plaintiff, or a defendant who has de-
murred or answered, or gives notice of appearance, resides out of
the State, and has no attorney in the action, the service may be
made by mail, if his residence be known; if not known, on the
clerk for the party. Code, § 415. As to service on non-resident
attorneys, see Laws of 1866, ch. 175, and *ante*, 27, 28.

For the general practice as to serving notices, etc., see Notices.

By noticing a cause for trial, the party giving the notice waives the right of subsequently moving to strike out redundant matter from his adversary's pleading. *Esmond v. Van Benschoten*, 5 How. 44. So by noticing a cause for trial, the party admits that the cause is at issue, and is estopped at the trial from denying the joinder of issue. *Oneida National Bank v. Stokes*, 58 Barb. 508.

The act of a party in noticing the cause for trial is also a waiver of his right to amend his pleadings without leave. *Phillips v. Suydam*, 6 Abb. N. S. 289; 54 Barb. 153.

Where a plaintiff notices a cause for trial, but neglects to try it, he will be liable to the defendant for the costs of the circuit. *Potter v. Lewis*, 18 Wend. 519; *Poltz v. Curtis*, 9 id. 497; 18 id. 519 *n*; *Townsend v. Cowen*, 19 id. 639; *Bishop v. Morgan*, 1 Code R. N. S. 340; *Milton v. Griffiths*, 1 D. N. S. 769; 6 Jur. 463; *Blow v. Wyatt*, 4 Mees. & Wels. 407; 7 D. P. C. 86.

But if the defendant does not appear when the cause is called on, he will not be entitled to costs. *Morgan v. Fernyhough*, 11 Exch. 205; 1 Jur. N. S. 688; 25 L. J. Exch. 52; *Newton v. Chaplin*, 7 C. B. 774.

As the defendant may now notice the cause as well as the plaintiff, if he avails himself of this right and notices the cause, but the plaintiff does not, and the cause is reached and regularly called, the defendant ought to move it on such call; and if he does not, while the plaintiff is present ready and willing to try the cause, the defendant ought to pay the costs of the circuit. In such a case it is his fault that the cause is not tried; and if he calls the plaintiff to court with his witnesses, so as to be ready to try the cause, there is no good reason why the defendant should not pay costs, in the same manner that the plaintiff is required to do if he does not move a cause when he has noticed it. Besides this, there are many cases in which the entire defense is affirmative, in which case the defendant really occupies the position of plaintiff. But, upon general principles, neither party should be permitted to call the other to attend a circuit without paying costs if he does not move the cause when reached, if the other party is ready to try it.

m. Renewing notice of trial. If the cause is not tried at the circuit for which it was noticed, the plaintiff cannot bring it on

Renewing notice of trial — Countermanding notice of trial.

for trial at the next circuit without giving a new notice of trial. *Ante*, 24, 25.

In the first judicial district there need be but one notice of trial and one note of issue from either party, and the cause will then remain on the calendar until disposed of, and, when called, may be brought to trial by the party giving the notice. Code, § 256.

The service of a previous void notice will not affect the validity of a valid subsequent notice which is served in due time, and according to the practice of the court. *Fell v. Tyne*, 5 Dowl. P. C. 246 ; 2 H. & W. 299.

A notice for a particular term, with a statement that if the cause is not then tried it will be continued on the calendar from term to term until it shall be reached, is insufficient, and of no effect as to subsequent circuits. *Beekman v. Reed*, 5 Cow. 23.

But a cause regularly noticed, and put upon the calendar for a particular circuit, may, before the close of that term, be noticed for the next circuit, provided such notice contains a clause that it is to be operative only upon the condition that the cause is not tried at that present term. *Faulkner v. Mayor, etc., of Brooklyn*, 2 How. 151 ; *Carpenter v. Tuffs*, id. 166, 168.

n. Countermanding notice of trial. If, after noticing a cause for trial, it is found by the party giving the notice that he cannot safely proceed to trial, he should promptly countermand the notice to avoid the payment of the costs of the circuit.

The Code has not made any express provision in relation to countermanding a notice of trial, and therefore the old practice remains in force. Code, § 469.

The notice of countermand must be in writing, and served in the usual manner (Code, § 408), at least six days before the day for which the notice was given, or twelve days if the service is by mail. Code, § 412. See *ante*, 29, 30.

Giving a notice of countermand may not relieve a party from the payment of some costs, if they have been incurred, as the opposite party is entitled to all costs actually incurred by him previous to the service of such countermand. 2 R. S. 618 (642), § 36 ; *Dauchy v. Allen*, 3 How. 210.

Such costs may be obtained under an order procured upon motion. *Dauchy v. Allen*, 3 How. 210 ; *Jennings v. Holbert*, 1 id. 66 ; *Anonymous*, 7 Hill, 168 ; *Mix v. Brisdan*, 2 Wend. 286 ; *Morse v. Lafarge*, id. 241. Such costs will be obtained upon a

Countermand of notice of trial.

motion for judgment as in case of nonsuit, if granted by the court. *Petit v. Hewlett*, 2 How. 157; *Bromaghim v. Gorse*, 1 id. 53. The former equity practice gave costs if the cause was noticed and then countermanded. *Doe v. Roe*, 5 Hill, 376; *Anonymous*, 2 P.Wms. 68.

The payment of costs may be enforced by a precept in the nature of an execution. Laws 1847, ch. 390, § 3; *Gamble v. Taylor*, 43 How. 375, 377; *Slocum v. Watkins*, 1 Denio, 631; *Lucas v. Johnson*, 6 How. 121; 1 Code R. N. S. 301; *Wetzel v. Schultz*, 13 How. 191; 3 Abb. 468.

If not collected by precept the costs may be included in the general bill taxed in the action. *Gamble v. Taylor*, 43 How. 375, 377; *Bulkeley v. Keteltas*, 2 Sandf. 735; *Mix v. Brisban*, 2 Wend. 286.

When a notice of trial has been duly countermanded, it is from that time the same as though no notice had been given. *Doe d. Pugh v. Price*, 1 B. C. Rep. 311; 11 Jur. 311. An undertaking by the defendant to accept short notice of trial does not entitle the plaintiff to give less than the usual notice of countermand. *King v. Jones*, 1 C. & M. 71; 1 D. P. C. 640. And where a plaintiff avails himself of the terms of short notice of trial he has no power of countermand; and, therefore, if he does not proceed to trial he must pay costs up to the time of the countermand. *Doncaster v. Cardwell*, 2 Mees. & Wels. 390; 5 D. P. C. 582.

Rule 22 of 1830, which required six days' notice of countermand, is not found in the present rules; but the practice was well established while the rule was in force. What effect the omission of that rule will have has not been decided by the courts. In the foregoing remarks it has been assumed that a defendant who notices a cause and then countermands it, is liable for the costs of the circuit in the same manner that a plaintiff would be under similar circumstances. See *ante*, 36.

Countermand of notice of trial.

(*Title of cause.*)

SIR: You will take notice that I hereby countermand the notice of trial heretofore given by me to you for the trial of this cause at the _____ circuit, which notice was dated _____

E. B., *Plaintiff's Attorney.*

To D. McM., *Defendant's Attorney.*

o. Proof of service of notice of trial. It may be important to prove the service of the notice of trial, as in cases where the opposite party does not appear at the trial, or where he disputes such service. It is the usual practice to obtain an admission of the service, which admission is rarely refused. The form of the admission has been given, *ante*, 35.

If no admission is obtained it will be proper to prepare an affidavit showing the time and manner of service, and have it sworn to by the person making the service. This ought to be done at once, so that the proof may be ready when required.

Section 4. Putting the cause upon the calendar.

a. In general. Whenever either party has duly noticed the cause for trial, his next step will be to put the cause on the calendar, so that the court may take cognizance of the action.

It is evident that the Code requires every cause to be put upon the calendar before it can be properly brought to trial. And the statute is express, that the clerk shall put the cause upon the calendar, when a note of issue has been duly filed with him. Code, § 256.

If a cause is not upon the calendar, it cannot be moved on for trial. *Culver v. Felt*, 4 Rob. 681; 30 How. 442. Nor can a defendant take a dismissal of the complaint founded upon a notice of trial, if the cause has not been regularly placed upon the calendar. *Browning v. Paige*, 7 How. 487.

b. Note of issue. A note of issue ought to contain the title of the action, the names of the attorneys, and the time when the last pleading was served. Code, § 256. This note ought to be furnished to the clerk at least eight days before the court. If the note is sent by mail, this ought to be done in season to reach the clerk in due time, and the postage should be duly paid. If the note of issue is not furnished in due season, and the cause is not upon the calendar, the court may refuse to allow it to be put there, even upon a strong affidavit in excuse. *Wilkin v. Pearce*, 4 How. 26. See Rule 48, as to general term calendar.

A note of issue ought to show upon its face whether it was filed by the plaintiff or by the defendant. And it ought to state the nature of the issue, and for what term of the court, whether for the general or the special term, or for the circuit. It ought also to state whether the issue is one of law or one of fact, and, if it is an issue of fact, whether it is to be tried by the court or by a jury.

Note of issue for a jury trial — The calendar.

If both parties desire to try the cause, it is best for both to notice it and to file notes of issue, so that either may move the cause when reached. *Ante*, 26.

Issues of fact to be tried by a jury must be placed upon the calendar of the circuit court. Code, § 255.

If the cause is entitled to a preference upon the calendar, the note of issue ought to state that fact.

Note of issue for a jury trial.

SUPREME COURT.

A. B. <i>agst.</i> C. D.	}	E. B., <i>Plaintiff's Attorney.</i> D. McM., <i>Defendant's Attorney.</i>
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Plaintiff's note of issue.

Issue of fact to be tried by a jury.

Issue joined January 22, 1873.

c. The calendar. It is the duty of the clerk to make up the calendar from the notes of issue duly filed with him. This calendar he procures to be printed, and copies are then furnished to the court, and to the members of the bar who may desire them. The expense of printing is a county charge. Laws 1862, ch. 86.

If the note of issue is not served in time, the cause is usually put at the foot of the calendar, but it is not considered as regularly there for any purpose, especially when the opposite party is not present and does not consent. See *Browning v. Paige*, 7 How. 487, 489.

The parties may, however, by consent, enter the cause upon the foot of the calendar at any time during the term, with the assent of the court.

In arranging the causes upon the calendar, if there are several issues of the same date, the clerk will give priority according to the time when the notes of issue were filed. The date of the issue is fixed by the time when the last pleading was served in the action. Code, § 256.

The causes are generally called in their order, as they have been arranged by the clerk on the calendar.

The court, however, has a large discretion in this respect. *Maretzek v. Cauldwell*, 4 Rob. 666. And it may be said that the entire control of the calendar is under the direction of the court. *Id.* See *ante*, 7 to 9.

d. Preferred causes. This subject has been sufficiently noticed. *Ante*, 7 to 9.

e. Correcting the calendar. If the clerk has not properly put the cause upon the calendar, as where it is not put in its proper order thereon, or where he has entirely omitted it therefrom, the party interested should attend the court and apply to have the error corrected.

The proper time to make such a motion is at the opening of the court, and before the calling of the calendar is commenced. Such motions have a preference over all other motions. If the motion is not made on the first day of the circuit, which is usually on Monday, the court will not hear or grant the motion on the following Thursday, or other later day. *Anonymous*, 28 How. 394.

The proper place to apply for a correction of the calendar is at the circuit or trial term, as the special term will not fix the date as to which a cause is to be put upon the circuit calendar. *North v. Sargeant*, 14 Abb. 224, 226. The correction of the circuit calendar belongs exclusively to the judge holding the circuit. *Allen v. Calhoun*, 6 Cow. 32.

f. Rule as to calendars in New York city. In the first judicial district there need be but one notice of trial, and one note of issue from either party, and the cause will then remain on the calendar until disposed of, and, when called, may be brought to trial by the party giving the notice. Code, § 256. As to calling and passing causes in the city of New York, see Laws 1849, ch. 439, §§ 16, 17; 2 Till. & S. Pr. 439; 2 Whit. Pr. 331-333.

Section 5. Short calendars.

a. Supreme court, New York city. Short causes, in which there is no substantial defense, are sometimes placed on a special calendar. In New York city the following rule is in force in the supreme court: At any circuit of this court, any causes belonging to either of the two following classes may be placed on a special circuit calendar, unless the trial is likely to occupy more than one hour:

1. Where the action is on contract, and the answer merely denies the allegations in the complaint, without setting up new matter.

2. Where the action is on contract, and new matter is set up in the answer, and there is reason to believe that the defense is made only for the purpose of delay.

Special calendars — New York superior court.

To entitle the cause to be placed on such calendar, the plaintiff's attorney must give notice four days before any Monday in the circuit that he will move, on such Monday, to have the cause placed on such calendar; and the motion will be heard on such Monday, and, if granted, the cause may be heard on the following Friday. If the notice is founded on the belief that the defense is for delay, affidavits must be served at the time of serving the notice.

The plaintiff's attorney must also deliver to the clerk of the circuit a like notice, four days before such Friday, containing also the number of the cause on the general calendar.

The same motion may be made on any day, before the judge at chambers, on a notice of four days.

If the cause actually occupies more than one hour on the trial, the trial may be suspended, at the discretion of the court, and the same put down at the foot of the calendar.

b. New York superior court. In the New York superior court, by rule 23, adopted March 1, 1870, it is thus provided: In actions on contract, where there is reason to believe that the defense is interposed for the purpose of delay, and the trial will not occupy more than one hour, the plaintiff may apply by motion at special term, on a notice of four days, to have the issue placed upon a special calendar for trial (serving with such notice any affidavits or papers he may wish to use on the motion, which have not been already served), and the same may be so ordered, in the discretion of the justice before whom the motion shall be made.

If such motion be granted, the cause will be entered on the special calendar, to be made by the clerk, on receiving a note of the issue, specifying the number of the cause on the general calendar, and the date of order directing it to be placed on such special calendar; such note of issue to be filed with the clerk four days before the day on which the cause shall be so entered. The special calendar shall be called on the second and last Friday of each jury term, in part first, by the justice then presiding, and the causes may be tried in either part, as may be directed by such justice.

If the trial of the cause shall occupy more than one hour, the trial may be suspended, at the discretion of the court, and the cause be placed at the foot of the general calendar.

New York common pleas — Supreme court, second judicial district.

c. New York common pleas. In the New York common pleas, by rule 16 of 1870, it is provided :

In any action on contract, where there is reason to believe that the defense is interposed for delay, or that the trial will not occupy more than one hour, either party may, upon a notice of four days, apply at chambers to have the cause placed upon the special calendar for short causes, and which will be made up for the third Friday in each trial term.

If the motion be granted, the order shall forthwith be delivered to the clerk, with a notice of the number of the cause on the general calendar.

If the trial be not concluded in one hour, it will be suspended, and the cause will thereupon be put at the foot of the general calendar, unless the presiding judge shall otherwise order.

d. Supreme court, second judicial district. The second judicial district, by a rule adopted October 24, 1856, provided as follows :

At each circuit to be held after the first day of January, A. D. 1857, in the county of Kings, and also in any other county in the district where the circuit calendar shall contain more than one hundred causes, upon the order of the justice holding such circuit, a special circuit calendar shall be made up of causes belonging to either of the two following classes, unless the trial is likely to occupy more than one hour :

1. Where the action is on contract, and the answer merely denies an allegation in the complaint, without setting up any new matter.

2. Where the action is on contract, and new matter is set up in the answer, and there shall be reason to believe that the defense is made merely for the purpose of delay.

Either party intending to make application to place any cause on such calendar shall give notice thereof to the opposite party, at the time of noticing the cause for trial, and, if the application shall be founded on the belief that the defense is for delay, affidavits disclosing the ground therefor must be served at least seven days before the circuit. On the first day of the circuit, after the juries shall have been impaneled and after hearing motions to correct the calendar, the calendar will be called through, and motions to place causes upon the special circuit calendar will be heard as the causes are called.

The causes ordered to be placed on such special calendars will

Affidavit of merits — When necessary.

be arranged by the clerk on such a calendar in the order of their dates of issue ; and such calendar will be taken up on Monday of the second week of the circuit, and proceeded with till all the causes thereon shall be tried, unless the court, for cause, shall alter the course of business.

If any cause placed on such special calendar shall actually occupy more than one hour on the trial, the court, in its discretion, may suspend the trial, and either restore the cause to its place on the general calendar, or order it to be put at the foot of the calendar.

Section 6. Affidavit of merits.

a. In general. If the defendant would prevent the plaintiff from taking an inquest, he ought to file and serve an affidavit of merits, in due form, and in proper season. The Code does not dispense with the necessity of an affidavit of merits, if it is desired to prevent the taking of an inquest. *Anderson v. Hough*, 1 Sandf. 721 ; 1 Code R. 50 ; 6 N. Y. Leg. Obs. 365 ; *Sheldon v. Martin*, 1 Code R. 81 ; *Dickinson v. Kimball*, id. 83.

A verified answer will not supply the place of an affidavit of merits. *Ib.* *Jones v. Russell*, 3 How. 324 ; 1 Code R. 113. On overruling a demurrer to a complaint as frivolous, leave to answer will not be given without an affidavit of merits. *Appleby v. Elkins*, 2 Sandf. 673 ; 2 Code R. 80. See *Harlow v. Hamilton*, 6 How. 475, 479.

In common-law actions, inquests have been allowed for more than half a century. See Rule of 1808 ; 3 Johns. 542 ; 1 Dunlap's Pr. 581, 582 ; 1 Paine & Duer's Pr. 459, 461 ; 1 Graham's Pr. (2d ed.) 292 ; 1 Burr. Pr. (2d ed.) 214. See *ante*, 33.

b. When necessary. In actions of an equitable nature, which are not to be tried by a jury, no affidavit of merits is required, as there cannot be an inquest in such a case.

But in all common-law actions in which an inquest could formerly have been taken, they may be taken now, provided a sufficient affidavit of merits is not duly made, filed and served. Sup. Ct. Rule 36 ; *Anderson v. Hough*, 1 Sandf. 721 ; 1 Code R. 50 ; 6 N. Y. Leg. Obs. 365 ; *Jones v. Russell*, 3 How. 324 ; 1 Code R. 113.

It is to be remembered that the present rule does not require, as the former rule did, that the notice of trial should inform the defendant that an inquest will be taken ; although it declares that an inquest may be taken. The result of the change in the

Affidavit of merits, when not necessary — When to be made.

rule is to leave the plaintiff at liberty to take an inquest in a proper action, if no sufficient affidavit of merits is filed and served. And it would seem that the defendant must take notice, at his peril, whether such an affidavit is required. See *ante*, 44.

c. When not necessary. Inquests are now allowed in those cases in which they were heretofore allowed. Sup. Ct. Rule 36. In the preceding letter *b*, we saw that it was only in common-law actions that inquests could formerly be taken; and that they were not allowed in equity actions. When the complaint has neither been filed nor served, and the defendant has not had any opportunity to examine the nature of the cause of action, he will not be required to produce any affidavit of merits on any motion relating to the complaint. *Engs v. Overing*, 2 Code R. 79.

In an action upon an account, where the only defense is a set-off, to which there is no reply interposed, an affidavit of merits is not necessary, as the plaintiff cannot take judgment without allowing the set-off, even though the defendant does not appear at the trial. *Potter v. Smith*, 9 How. 262. See *Clinton v. Eddy*, 1 Lans. 61, 62.

The plaintiff is not required to make an affidavit of merits, even in an action of replevin, for the purpose of preventing the defendant from moving the cause out of its order on the calendar and taking an inquest. *Regan v. Priest*, 3 Denio, 163. The defendant may bring the cause to trial, but he cannot do so out of its regular order on the calendar. *Ib*.

d. When to be made. An affidavit of merits ought to be filed and served on or before the first day of the circuit at which the cause is noticed for trial. If this is not done in those actions in which it is necessary to do so, the plaintiff may take an inquest on the second or any subsequent day of the circuit. Sup. Ct. Rule 36.

The prudent practice will be to file and serve an affidavit of merits as soon as the cause is at issue.

Until the complaint is filed or served, the defendant will not know the nature of the action stated therein, and he cannot intelligently make an affidavit of merits. *Engs v. Overing*, 2 Code R. 79. If made before such filing or service, it will be insufficient to prevent the taking of an inquest. *Geib v. Icard*, 11 Johns. 82. A verified answer which is sworn to and served before the complaint is drawn up or served will be regarded as a fraud upon the rules and practice of the court, and therefore insuffi-

Affidavit of merits, by whom to be made.

cient. *Phillips v. Prescott*, 9 How. 430, 433. And for the same reason an affidavit of merits would be defective, where the defendant does not know the contents of the complaint.

e. By whom to be made. As a general rule the defendant is the person who is best acquainted with the facts relating to the defense; and, therefore, the affidavit of merits ought to be made by him. The affidavit of another person will not be sufficient, unless some satisfactory reason is given why it is made by him and why it was not made by the defendant. And so when the defendant's attorney makes this affidavit, it ought to show on its face a reasonable excuse for omitting the defendant's affidavit. *Roosevelt v. Dale*, 2 Cow. 581, 583; *Johnson v. Lynch*, 15 How. 199, 201; *Mason v. Bidleman*, 1 id. 62.

But where a good excuse is offered for the absence of the defendant's affidavit, as where he is beyond the sea, absent from the State, or so sick as to be unable to make it, the affidavit of the defendant's attorney will be sufficient, if it shows these facts on its face. *Johnson v. Lynch*, 15 How. 199, 201; *Philips v. Blagge*, 3 Johns. 141; *Geib v. Icard*, 11 id. 82.

So the affidavit may be made by one who acts as the attorney in fact of the defendant, although he is not the attorney on record, nor even an attorney at law. *Mason v. Bidleman*, 1 How. 62; *Johnson v. Lynch*, 15 id. 199, 201.

It is no objection to such affidavit that it states that the knowledge of the defense was derived from the defendant, as this is generally all the information which the defendant's attorney can have. *Johnson v. Lynch*, 15 How. 199, 201, 202; *Philips v. Blagge*, 3 Johns. 141.

An affidavit of merits must appear to have been made by the defendant himself, or by his attorney or agent. *Morris v. Hunt*, 1 Chit. 97; *Rowbotham v. Dupree*, 5 D. P. C. 557. It may be made by the managing clerk of the defendant's attorney, who may know more of the cause than the attorney himself. *Anonymous*, 1 Smith, 61; *Neesom v. Whytock*, 3 Taunt. 403. In such case the affidavit must show that such clerk had the management of the particular case. *Doe d. Fish v. McDonnell*, 8 D. P. C. 501; 4 Jur. 578.

If the affidavit could have been made by the defendant at any time before the circuit, the affidavit of his attorney will be insufficient to prevent a regular inquest. *Johnson v. Lynch*, 15 How. 191, 201, 202; *Philips v. Blagge*, 3 Johns. 141.

Affidavit of merits, its requisites, its form.

Such affidavit may be made by one who is the real party in interest, though not named as defendant in the record. *Miller v. Hooker*, 2 How. 124; *Roosevelt v. Dale*, 2 Cow. 581, 583, 584. Where there are several defendants, and all their defenses are identical, an affidavit of merits made by any one of them will be sufficient for all, if he is acquainted with the facts. *Ontario Bank v. Baxter*, 6 Cow. 395. But where one of two defendants makes the affidavit alone, it ought to show that the defense of both is identical, or it will be insufficient. *Clark v. Parker*, 19 Wend. 125. Where the maker and the indorser of a note are sued in an action, the affidavit of the maker will not prevent an inquest against the indorser, unless it shows that both defenses are identical. *Ib.*

f. The affidavit, its requisites, its form. The affidavit ought to state positively, and without qualification, that the defendant has a defense upon the merits. This must be stated upon the advice of counsel, although that may be omitted where the defendant is himself a counselor at law. *Cromwell v. Van Rensselaer*, 3 Cow. 346.

It ought to state that the defendant has fully and fairly stated the case to his counsel, and should give the name and residence of such counsel. Rule 29. Equivalent words will not answer, and a statement that the defendant has made "a full and fair statement of all the facts of the case, as far as they had come to his knowledge, and believed them to exist," will be defective. *Brown v. St. John*, 19 Wend. 617.

If the affidavit omits to state that the defendant has fully and fairly stated the case to his counsel, it will be insufficient. *Cary v. Livermore*, 2 How. 170. An affidavit is defective when it merely alleges that the defendant has stated "his case in this cause" to his counsel. *Ellis v. Jones*, 6 How. 296. So of a statement that the defendant has "fully and fairly stated his defense." *Richmond v. Cowles*, 2 Hill, 359. So of a statement that the party "has fully and fairly stated the facts of his case." *Fitzhugh v. Truax*, 1 Hill, 644. Yet, an affidavit was sustained where it alleged that the defendant had fully and fairly stated "the facts of this case." *Jordan v. Garrison*, 6 How. 6; 1 Code R. N. S. 400. Or a statement that the defendant has fully and fairly stated "this case, or his case" to his counsel, is good. *Brownell v. Marsh*, 22 Wend. 636; *Brown v. Masten*, 2 How. 195. But it is not enough to say that he has stated "his defense"

 Affidavit of merits, its requisites, its form.

to his counsel. *Ib.*; *Tompkins v. Acer*, 10 How. 309, 310; *Rickards v. Swetzer*, 3 id. 413, 414; 1 Code R. 117. See, also, *McMurray v. Gifford*, 5 How. 14, 16.

The affidavit must state that the defendant has been advised by his counsel that he has a good and substantial defense upon the merits. *Swartwout v. Hoage*, 16 Johns. 3; *Johnson v. Rogers*, 3 Cow. 14; *Anonymous*, 3 Wend. 425; *Cannon v. Titus*, 5 Johns. 355; *Bruen v. Adams*, 3 Caines, 97. This statement of advice by counsel is indispensable. *Ib.* The affidavit must state the defendant's belief, that he has a good and substantial defense. *Lynch v. Masher*, 4 How. 86; 2 Code R. 54; *Brittan v. Peabody*, 4 Hill, 61; *Wharton v. Barry*, 1 How. 62. Saying that the defendant has a *full* and substantial defense, is not equivalent to a *good* and substantial defense, and is therefore defective. *Bank of Utica v. Root*, 4 Hill, 535. See *Kennedy v. Hutchinson*, 4 Jur. 106, Exch.

The affidavit must show that the defense is "on the merits." *Tompkins v. Acer*, 10 How. 309, 310; *Meech v. Calkins*, 4 Hill, 534; *Bower v. Kemp*, 1 Cr. & J. 287; 1 Tyrw. 260; *Pringle v. Marsack*, 1 Dowl. & Ryl. 155; *Page v. South*, 7 D. P. C. 412. See *Lane v. Isaacs*, 3 D. P. C. 652. It must show that the defense is to the particular "action." *Tate v. Bodfield*, 3 D. P. C. 218. Stating a defense to "the plaintiff's demand on the promissory note on which the suit is brought," is insufficient. *Mason v. Moore*, 2 How. 70; *Durant v. Cook*, 1 id. 45. So of a defense "to the plaintiff's declaration filed in this suit." *Howe v. Hasbrouck*, 1 How. 68.

The affidavit need not allege in express terms that the advice of counsel was given *after* the statement of the case, especially where the affidavit imports that the advice was given after such statement. *Brown v. Seys*, 2 How. 276, overruling *Lansing v. Mickles*, 1 id. 248.

The affidavit ought to be entitled in the action in which it is used. *Baxter v. Seaman*, 1 How. 51. The Code, section 406, provides, however, that it is not necessary to entitle an affidavit in the action, and that if there is no title, or it be defective, it shall be as valid and effectual as though duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

But, under this rule, an affidavit which is to be used in the court of appeals will not be sufficient, if entitled in the supreme court. *Clickman v. Clickman*, 1 N. Y. (1 Comst.) 611; 3 How.

365; 1 Code R. 98. The superior court of New York city will allow an affidavit entitled in the supreme court to be read, if it appears that there is but one suit between the parties. *Bowman v. Sheldon*, 5 Sandf. 657; 10 N. Y. Leg. Obs. 339.

Where the affidavit is made by an illiterate person, the jurat ought to state that the affidavit was read over to him, and that he seemed to understand it. *Haynes v. Powell*, 3 D. P. C. 599.

Affidavit of merits made by defendant.

A. B.
agst.
C. D.

SS :

C. D. .

Affidavit of merits made by counsel.

Upon the back of this affidavit of merits indorse the title of the cause, the name of the paper, and the name and residence of the

Affidavit of merits made by counsel — Filing and serving.

defendant's attorney ; and, besides this, indorse upon the copy of the affidavit served upon the plaintiff's attorney a notice like the following :

SIR : *Take notice* that the within is a copy of an affidavit of merits, which has been filed in the office of the clerk of county, in the above-entitled action.

Yours, etc., D. McM.,
Defendant's Attorney.

To E. B., Esq.,
Plaintiff's Attorney.

It has been held that an affidavit of merits made and used for any other purpose will not be sufficient to prevent an inquest, or to use upon a motion. *Cutler v. Biggs*, 2 Hill, 409. See *Colgate v. Marsh*, 2 How. 137 ; *Popham v. Baker*, 1 id. 166 ; *Robinson v. Sinclair*, id. 106 ; *Alberti v. Peck*, id. 230.

By the new rules this practice is changed, and rule 29 provides that "when an affidavit of merits has once been filed and served, no other shall be necessary on making a motion, and the service and filing may be shown by affidavit."

When a sufficient affidavit of merits has been once duly filed and served, this will be sufficient during the pendency of the action, and for all subsequent circuits. *Prescott v. Roberts*, 6 Cow. 45, 46 ; *Van Rensselaer v. Hamilton*, 4 id. 539. See *Colver v. Van Valen*, 6 How. 102, 105.

Changing the place of trial to another county will not affect the validity of the affidavit of merits once properly filed and served. *Prescott v. Roberts*, 6 Cow. 45, 46.

The affidavit need not be special as under the old chancery practice. Though it has been held that the court may require this if suspicious circumstances demand it. *Dix v. Palmer*, 5 How. 233, 236 ; *Van Horne v. Montgomery*, id. 238, 240.

g. Filing and service. In all actions in which there can be a reasonable claim that an affidavit of merits is necessary, it is best to file and serve it. And it is safer to file and serve it when not necessary than to omit such filing and service ; for, if unnecessary, the act can do no harm, while, if necessary, the act is of importance.

The original affidavit ought to be filed with the clerk of the circuit where the cause is to be tried ; and this ought to be done as early as the first day of the circuit, at the very latest ; and it ought to be done at the earliest convenient time after the cause is at issue. *Ante*, 45.

 Controverting the truth of the affidavit — Amendment of affidavit.

A copy of this affidavit, with a notice of the filing of the original, ought to be indorsed thereon, and ought then to be served on the plaintiff's attorney before an inquest is taken. Rule 29. Although the original affidavit is regularly filed, if a copy is not served on the plaintiff's attorney in due time, an inquest will be regular. *Baker v. Ashley*, 15 Johns. 536; *Cannon v. Titus*, 5 id. 355.

Where an affidavit of merits is served at the circuit, and the plaintiff's attorney is not present, it may be served on the plaintiff's counsel having the cause in charge. *Brainard v. Hanford*, 6 Hill, 368.

But where a defendant delays, until the second day of the circuit, to file and serve an affidavit of merits, in order to prevent an inquest, he is bound, at his peril, to serve it in such a way as, in all reasonable probability, to bring the service to the knowledge of the attorney or counsel having charge of the cause at the circuit, before the inquest is taken. *Smith v. Aylesworth*, 24 How. 33, 37. See, also, *Anonymous*, 6 Abb. 512.

A service on a clerk in the office, in the absence of the plaintiff's attorney, is equivalent to a service on the attorney, and is sufficient, especially where the clerk has ample time to notify the attorney before the inquest. *Ib.* But, see *Ramsey v. Erie Railway Co.*, 57 Barb. 450; 3 Lans. 181; *Brainard v. Hanford*, 6 Hill, 368.

h. Controverting the truth of the affidavit. An affidavit of merits cannot be contradicted for the purpose of sustaining an inquest and to prevent the opening of the default. *Hanford v. McNair*, 2 Wend. 286; *Philips v. Blagge*, 3 Johns. 141; *Blewitt v. Gordon*, 1 D. N. S. 815; 6 Jur. 825; *Heane v. Battersby*, 3 D. P. C. 213. And, see *Quinn v. Case*, 2 Hilt. 467, 471; 9 Abb. 160, 162.

But an affidavit has been received to contradict the sufficiency of the excuse for not serving the notice for the first day of the term. *Quin v. Riley*, 3 Johns. 249.

So an affidavit has been allowed for the purpose of contradicting the alleged excuse why the defendant did not make the affidavit of merits. *Johnson v. Lynch*, 15 How. 199, 202.

i. Amendment of affidavit. Where there is some technical defect in an affidavit of merits, but where there is also a good defense, the court will usually give an opportunity for supplying such defect. And, generally, the motion is denied without

Calling calendar; reserving causes.

prejudice to a renewal, or, it is allowed to stand over until a proper affidavit can be filed and served. *Brown v. Tousey*, 19 Wend. 617, 619; *Ellis v. Jones*, 6 How. 296, 298; *Tompkins v. Acer*, 10 id. 309, 310; *Cary v. Livermore*, 2 id. 170.

The court may, when the circumstances are suspicious, and there has been great delay, refuse an opportunity of renewing the motion or of amending the affidavit. *Rickards v. Swetzer*, 3 How. 413, 414; 1 Code R. 117; *Johnson v. Lynch*, 15 How. 199, 203.

Section 7. Calling calendar; reserving causes.

a. In general. The calling of the calendar is not usually the first thing done at the circuit. At the opening of the court, and after the proclamation of the crier, the judge generally directs the clerk to call over the list of petit and of grand jurors. If any are absent without excuse they are fined, and if they offer a sufficient excuse they are discharged for the day or for the term.

Motions to correct the calendar, or to postpone causes, or to refer them, are then heard. And then motions generally which are proper to be heard at circuit are frequently heard, especially if it is important that they be heard at that time. After calling and swearing such petit jurors as appear, and after impaneling, swearing and charging the grand jury, the calendar is taken up. Before the regular call of the calendar all corrections ought to be made, or at the latest when the cause is called on the preliminary call.

Generally the judge calls each cause on the calendar in the order in which they stand, for the purpose of ascertaining what causes are ready for trial, and also for the purpose of referring such causes as are properly referable, or are such as the parties desire to refer. Causes in which neither party is ready are disposed of by putting over the term, or setting down for some day during the term.

In some districts a day calendar is prepared, on which a limited number of causes is placed for trial on the day specified. These causes are taken from the general calendar, and in the order in which they stand on that calendar.

On this preliminary call of the calendar, which is merely intended to ascertain what causes are ready, and for the prompt disposition of such causes as the parties desire by way of reference or postponement, it is not usual to default either party

Reserving causes — Inquests.

But, when the regular call of causes is commenced, either party may take the default of the other if he does not appear and answer to such call.

If neither party answers, the cause is passed and goes to the foot of the calendar unless the judge otherwise directs. And, if the cause is passed, the judge may re-instate it upon a sufficient excuse being shown. See *ante*, 40.

The time at which the court opens is that of the place in which the court sits. *Curtis v. March*, 3 Hurlst. & Norm. 866.

Counsel have a right to rely upon the presumption that causes will be called and heard in their regular order on the calendar; and they may act upon that belief in calculating how long a time they have for preparation before the cause is called. *Belmont v. Erie Railway Co.*, 52 Barb. 637, 657. And, though the court has power to call up causes out of their order upon the calendar, yet if this is done so as to operate as surprise upon one of the parties, relief will be granted. *Ib.*

b. Reserving causes. In the superior court of New York city, by rule 14, and in the common pleas of the same city, by rule 12, provision is made for reserving causes.

In the supreme court, if either party, or if both parties desire to have a cause reserved for a particular day of the circuit for trial, such request is usually granted, if no valid reason is opposed to it.

The practice as to reserving causes is so much in the discretion of the circuit judge that few general rules can be laid down upon that subject.

Section 8. Inquests.

a. In general. An inquest is the finding of a jury in a civil action, in a case where the defendant does not appear at the trial. In this case the cause is taken up out of its regular order on the calendar, on the application of the plaintiff, and an *ex parte* trial is had, which excludes any affirmative matter of defense, unless it should be something admitted by the pleadings, as a set-off not denied. *Ante*, 45.

The practice of taking inquests has long prevailed in this State. Rule of 1808; 3 Johns. 542; 1 Dunl. Pr. 589, 590; 1 Paine & Duer's Pr. 458, 459; Grah. Pr. (2d ed.) 262, 263; 1 Burr. Pr. (2d ed.) 213. There is nothing in the Code which abrogates or materially changes the former practice in taking inquests. *Anderson v. Hough*, 1 Sandf. 721; 1 Code R. 50; 6 N. Y. Leg.

Inquests — In what cases allowed.

Obs. 365; *Haines v. Davis*, 6 How. 118; 1 Code R. N. S. 407. And, by the 36th rule of the supreme court the right and the power to take inquests is expressly declared; and they may be taken in any case in which they might heretofore have been taken.

The plaintiff may waive a jury and take an inquest before the court, by calling up the cause out of its order, if the defendant does not appear at the trial. *Haines v. Davis*, 6 How. 118, 119; 1 Code R. N. S. 407. See, also, *Goodyear v. Baird*, 11 How. 377.

Whether such a trial is technically an "inquest," is of no importance, since the trial is regular. *Ib.*

The plaintiff may call a jury if he prefers to do so, or may try it before the court alone; but in that case it ought to be done before the jury have been discharged for the circuit. *Ante*, 11, Waiver of jury.

b. In what cases allowed. Inquests may be taken in actions, out of their order on the calendar, in cases in which they were heretofore allowed, at the opening of the court. Rule 36. This will allow an inquest in a common-law action. *Ante*, 44. But inquests were, as a general rule, unknown in equity suits, and there cannot be such a thing as an inquest in an equity action under the present practice, unless in the case of an issue in the nature of a feigned issue. *Ante*, 44, 45.

One exception existed formerly in equity suits, and where a feigned issue was awarded to be tried in a court of law, an inquest might be taken as in actions at law; and if irregularly taken, the court of law would set it aside. *Den v. Fen*, 1 Caines, 487. See *Doe v. Roe*, 1 Johns. Cas. 402, 405, note *a*; *Snell v. Loucks*, 12 Barb. 385. For irregular practice, the courts of law would set aside an inquest in such feigned issues, though relief on the merits was sought in the court of equity framing the issue. *Ib.*

By rule 12 of the New York superior court, and rule 11 of the New York common pleas, in cases placed on the day calendar, which is called through every morning at the opening of the court, the plaintiff may take an inquest if the defendant fails to appear.

Where the omission to file and serve an affidavit of merits is accidental, or where other sufficient reasons are shown why it was not filed and served, the court may, on such terms as are

Inquests, by whom taken — Against whom taken.

just, order that the taking of an inquest shall be delayed to enable the defendant to file and serve such affidavit.

c. By whom taken. Rule 36 allows inquests in the cases in which they were heretofore allowed; and, under the former practice, no one but the plaintiff could take an inquest. The fact that the defendant could bring a replevin cause to trial did not enable him to move the cause out of its order on the calendar and take an inquest. *Regan v. Priest*, 3 Denio, 163. And, under the present practice, no new authority is conferred as to inquests, so that a defendant cannot now move a cause out of its order on the calendar and take an inquest against a plaintiff. If the defendant has regularly noticed the cause, filed a note of issue, and had the cause put upon the calendar, he may take a dismissal of the complaint, on a regular call of the calendar, if the plaintiff does not appear.

d. Against whom taken. Where issue has been joined by all the defendants, a notice of trial and inquest must be served on all the defendants before an inquest can be regularly taken. *Livingston v. McIntyre*, 2 How. 41.

In an action upon an alleged joint contract, where one defendant fails to answer and the others interpose a general denial, the plaintiff ought to bring the cause to trial as to all of the defendants, and have but one assessment of damages and but one judgment against all of the defendants. *Sluyter v. Smith*, 2 Bosw. 673; *Catlin v. Latson*, 4 Abb. 248; 13 How. 511; *Van Schaick v. Trotter*, 6 Cow. 599; *Bacon v. Comstock*, 11 How. 197; *Warner v. Ford*, 17 id. 54, 55.

It is neither necessary nor proper to enter up a judgment against the defaulting defendant until the other issues are disposed of by the court. *Ib.*

In actions where a several judgment may be proper under section 136 of the Code, an inquest may be taken against one defendant, if all have been duly noticed for trial. *Clark v. Parker*, 19 Wend. 125.

Where issue is joined by some of the defendants, and the others fail to answer, an inquest may be taken as to those answering. *Bank of Rochester v. Boulton*, 5 Wend. 106. See, also, *Catlin v. Latson*, 4 Abb. 248; 13 How. 511; *Sluyter v. Smith*, 2 Bosw. 673.

In an action against two defendants, upon a joint and several contract as joint, it cannot be treated as a several action unless

 Notice of taking inquest — Inquest, when to be taken.

one of the defendants is struck out as a party to the record, or he has a defense personal to himself. *Brown v. Richardson*, 4 Rob. 603.

e. Notice of taking inquest. The former rules of the court have always required that the plaintiff's notice of trial should contain a notice that he would take an inquest, if such was his intention. *Ante*, 33. But rule 36 dispenses with that requirement, and yet allows inquests to be taken in the cases in which they might heretofore have been taken. See *ante*, 33.

f. Inquest, when to be taken. It has long been the settled practice that an inquest could not be taken on the first day of the circuit, and such is the present rule. Rule 36. See, also, *ante*, 54.

No inquest can be regularly taken while the defendant is entitled to any privilege which is equivalent to a stay of proceedings.

And, therefore, when a motion is made to change the venue, the plaintiff cannot notice the cause and take a regular inquest, while the motion is under advisement, if such motion is granted.

Willson v. Henderson, 15 How. 90. The plaintiff takes the risk of having his proceedings set aside if the motion is decided against him. *Ib.* So a notice of trial and inquest will be irregular while the defendant's time to serve an amended answer continues, if such amendment is made in good faith. *Washburn v. Herrick*, 4 How. 15; 2 Code R. 2; *Griffin v. Cohen*, 8 How. 451; *Evans v. Lichtenstein*, 9 Abb. N. S. 141. See *ante*, 28. If the amendment is made for the purpose of delay, see *ante*, 5. Where the answer is not amendable as of course, the plaintiff may proceed in the usual manner and take an inquest. *Farrand v. Herbeson*, 3 Duer, 655; *Plumb v. Whipples*, 7 How. 411. An inquest cannot be regularly taken on the first day of the circuit unless it is regularly called in its order upon the calendar. Rule 36; *Smith v. Brown*, 1 Duer, 665. Nor can an inquest be regularly taken out of its order on the calendar on any day after the first day of the term, if so taken after the trial of causes has been commenced. *Newcomb v. Johnson*, 9 Wend. 451. The object of the rule was to excuse a defendant from constant attendance to watch the taking of an inquest, and therefore it cannot be taken except at the opening of the court, and before the court proceeds to the trial of litigated causes. *Ib.*; *Anonymous*, 6 Abb. 512.

When the defendant does not appear, the plaintiff may, after

Rights of defendant—Inquest, how taken.

the first day of the term, call up the cause out of its order on the calendar, and take an inquest before the court without a jury. *Haines v. Davis*, 6 How. 118; 1 Code R. N. S. 407; *Goodyear v. Baird*, 11 id. 377. But an inquest thus obtained or permitted ought to be taken before the jury have been discharged. *Ib.*; *Dickinson v. Kimball*, 1 Code R. 83.

g. Rights of defendant. When the cause is called out of its order, and an inquest taken because of the defendant's failure to file and serve an affidavit of merits, he will lose the advantages of making his defense. He may, however, appear at the inquest and cross-examine the plaintiff's witnesses, object to the plaintiff's evidence, and except to the rulings of the court. *Green ads. Willis*, 1 Wend. 78. He may overthrow the plaintiff's evidence by a cross-examination if he can; but he cannot establish an affirmative defense by such cross-examination. *Hartness v. Boyd*, 5 Wend. 563; *Kerker v. Carter*, 1 Hill, 101.

Where the cause is called in its *regular order* on the calendar, the defendant is entitled to appear and defend in the same manner as though a proper affidavit of merits had been filed and served. *Starkweather v. Carswell*, 1 Wend. 77; *Merwan v. Ingersol*, 3 Cow. 367.

When the defendant, by his answer, denies all the facts stated in the complaint, judgment cannot be taken, even by default, without evidence. *Patten v. Hazewell*, 34 Barb. 421. So if the defendant sets up a set-off in his answer which is not denied by the plaintiff's reply, the amount of such set-off must be allowed on taking an inquest, even when the defendant does not appear on the inquest. *Potter v. Smith*, 9 How. 262.

h. Inquest, how taken. The plaintiff cannot take an inquest, unless he has noticed the cause, and filed a note of issue and the cause is upon the calendar. *Potter v. Davison*, 8 Abb. 43; *Browning v. Paige*, 7 How. 487.

If the plaintiff desires to take an inquest, he attends the court at its opening, and files his notice of trial with the proof or admission of its due service, and delivers the pleadings to the clerk, who prepares a list of the inquests to be taken; and, when a jury has been impaneled, the clerk calls the causes in their order on this list. When the cause is called, the case is briefly stated to the jury by the plaintiff's attorney; after which he proceeds to introduce the necessary evidence, as he must do to obtain a regular verdict. *Patten v. Hazewell*, 34 Barb. 421.

Waiving inquest — Opening or relieving from inquest.

After the evidence is given the verdict of the jury is rendered, which is usually done without leaving their seats. Judgment upon this verdict is entered as upon an ordinary verdict. The clerk will, upon application to him, furnish the attorney with the pleadings delivered to him for the use of the court on the trial, together with a certified copy of the minutes of the trial, which ought to be annexed to the pleadings, and all these papers duly filed in the clerk's office, for the purpose of entering judgment thereon.

In preparing to take an inquest the plaintiff's attorney will make a copy of the pleadings for the use of the court; he will also have sufficient proof of the service of the notice of trial, and of the filing of the note of issue. If he requires witnesses, they will be duly subpoenaed. If he needs documentary evidence, it will be secured, and be sufficient in form and substance. And if computations of interest are important, they will be made and ready for use when needed in court. He will also be prepared, as well as practicable, for a trial in case the cause should be called in its regular order on the calendar, and the defendant then be ready for trial. As the defendant has a right to appear and object to the evidence offered (*ante*, 57), it will be important to have sufficient legal evidence to sustain the action, for if no evidence is given, the verdict will be set aside on the defendant's motion. *Patten v. Hazewell*, 34 Barb. 421. A verdict will not, however, be set aside for a variance between the evidence and the complaint. *Burger v. Baker*, 4 Abb. 11.

i. Waiving inquest. A plaintiff, who has obtained a regular inquest at the circuit, is not bound to waive it upon the application of the defendant, let the excuse be what it may, and upon an offer to pay costs. *Smith v. Howard*, 12 Wend. 198. The plaintiff may put the defendant to his motion, who, if relieved, instead of receiving the costs of the motion, must pay costs. *Ib.*

j. Opening or relieving from inquest. The opening of an inquest is a species of application for a new trial, and one that is frequently made, either on the ground of irregularity in taking it, or as a matter of favor. Generally, the application cannot be made by any one but a party to the action who is injured by the default. *Peck v. N. Y. & Liverpool Mail Steamship Co.*, 3 Bosw. 622. When the directors of an insolvent corporation will be heard. *Ib.*

If the defendant has made a case upon which to move for a

Opening or relieving from inquest.

new trial he must rely upon that, as the inquest will not be opened. *Mason v. Bidleman*, 1 How. 62.

Irregularity is a frequent ground of the motion for opening inquests. If the inquest is taken before it can be regularly done, as when it is taken on the first day of the circuit. Rule 36; *Smith v. Brown*, 1 Duer, 865. Or, if taken after the trial of a litigated cause at the circuit, on any day other than the first (*Newcomb v. Johnson*, 9 Wend. 451; *Anonymous*, 6 Abb. 512), it will be set aside as irregular. So of a case in which the inquest is taken before the defendant's time for serving an amended answer has expired (*ante*, 5, 28); or, where a motion for a change of venue is pending at the time of the inquest, but is subsequently granted (*ante*, 56); or, when a sufficient affidavit of merits has been filed and served in due season (*Roosevelt v. Kemper*, 2 Caines, 30; *Philips v. Blagge*, 3 Johns. 141; *Smith v. Aylesworth*, 24 How. 33); or, where the inquest is taken after a regular notice of an application for a commission has been given (*Le Conte v. Pendleton*, 1 Johns. Cas. 135. See *Kimball v. Knights*, 18 Wend. 657); or, when the notice of trial is irregular or defective (*Jenks v. Payne*, 15 Johns. 398; *Williams v. Williams*, 2 D. P. C. 350); or, no notice of trial is given. *Ib.* So when the inquest is taken while the parties are endeavoring to compromise, in pursuance of an appointment for that purpose (*Brevort v. Sayre*, 2 Caines, 377); or, where the plaintiff, without notice, obtains a vacation of an order to stay his proceedings, but retains it until the first day of the circuit, and then serves it at a great distance from the court, and takes an inquest on the same day. *Smith v. Bowen*, 2 Wend. 245.

But, where an order to stay is obtained by a defendant after receiving notice of trial, the plaintiff may, if he can, obtain a vacation of the order, and will be regular in taking an inquest afterward, without serving the defendant with notice that the order has been revoked. *Kimball v. Knights*, 18 Wend. 657. Under such circumstances it is the duty of the defendant to watch the cause. *Ib.*

In all these cases of irregularity on the part of the plaintiff, the inquest will be set aside with costs.

Relief on the *merits*, or by way of *favor*, is sometimes asked, and is granted where a reasonable excuse is shown by the affidavits, even where the inquest was regularly taken. *Shultys v. Owens*, 14 Johns. 345.

Opening or relieving from inquest.

Where counsel are absent and suffer an inquest to be taken on the ground that they believe the circuit is irregularly held, the defendant will be relieved upon an affidavit of merits, and on the payment of all the costs. *Eagle Bank v. Holley*, 7 Cow. 514. So where the defendant's counsel forgot to prepare an affidavit of merits in due time. *Allen v. Mapes*, 20 Wend. 633. So where counsel were engaged in another court of equal or superior jurisdiction. *Fowler v. Hay*, 1 How. 40. But not so in case counsel are trying a cause before a referee. *Ward v. Ruckman*, 23 How. 330; 32 id. 616 *n.* See *Morris v. Slatery*, 6 Abb. 74, 75. So when counsel were taken by surprise as to a call of the calendar. *Bosher v. Harris*, 1 How. 206; *Morrell v. Gibson*, id. 208; *Farnam v. Despard*, 1 Wend. 287.

It is a long and well-settled practice that authorizes the court, in its discretion, to set aside inquests or to open defaults, for the purpose of attaining justice by a fair trial, when it appears that there is a good and substantial defense upon the merits, or that such defense probably exists, to the whole or to some part of the action. *Leighton v. Wood*, 17 Abb. 177, 182. Such relief is often granted, even against the open and confessed negligence of the defaulting party, or of his attorney or counsel. *Ib.* An inquest should be set aside, unless the court can be fully satisfied that the defendant has no evidence which will materially reduce the recovery, or defeat it altogether. *Ib.* The terms of granting relief are usually the costs of the term which has been lost, of the inquest, and of opposing the motion to open the inquest. *Ib.*

On setting aside the inquest the court will not impose the terms that the defendant shall waive a plea of the statute of limitations, or of usury. *Allen v. Mapes*, 20 Wend. 633; *Lovett v. Cowman*, 6 Hill, 223; *Bank of Kinderhook v. Gifford*, 40 Barb. 659; *Sheldon v. Adams*, 41 id. 54; 18 Abb. 405; 27 How. 179; *Union National Bank of Troy v. Bassett*, 3 Abb. N. S. 359. So a party is not prohibited from setting up the defense of a former adjudication. *Audubon v. Excelsior Fire Ins. Co.*, 10 Abb. 64. As to usury, see *Morris v. Slatery*, 6 id. 74. If the answer is insufficient, the court may refuse to set aside the inquest. *Hunt v. Mails*, 1 Code R. 118.

In a proper case, and upon just terms, the attorney for the plaintiff will usually consent to open the inquest. If an order to open the inquest is granted, it must be duly entered and a

Appeal from order opening inquest — Defaults.

copy served upon the opposite attorney. And if the inquest is set aside upon terms, care must be taken to comply with such terms.

k. Appeal from order opening inquest. As the power to open an inquest is entirely discretionary, no appeal will lie from an order opening an inquest. *Ramsey v. Gould* 4 Lans. 476, 478, 479, and cases cited; *Farish v. Corlies*, 1 Daly, 274; *Mil-lard v. Van Ranst*, 17 Abb. 319 n. See *Leighton v. Wood*, id. 177.

Section 9. Defaults.

a. In general. The defaults which will be here referred to relate to such as take place when either party fails to appear at the trial after due notice. Neither party can take a default against the other, unless he has noticed the cause, filed a note of issue, and procured the cause to be placed upon the calendar. *Browning v. Paige*, 7 How. 487.

Either party giving the notice may bring the issue to trial, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with the cause, and take a dismissal of the complaint, or a verdict or judgment, as the case may require. Code, § 258.

b. Plaintiff's default. If the defendant has noticed the cause for trial, and the plaintiff fails to appear, the defendant's attorney or counsel may read the proof of his notice of trial, and take a judgment of dismissal of the complaint, with costs. Code, § 258.

But if the defendant does not desire a dismissal of the complaint, because he has interposed an affirmative defense, such as a set-off, counter-claim, or the like, he will introduce his evidence and take such a judgment as the pleadings and the evidence will warrant.

Where there are several defendants, and but one of them has answered the complaint, or where each has a separate distinct defense, and has appeared by a separate attorney, he may, with the permission of the court, take the plaintiff's default as to himself even though the other defendants do not appear. *Gurnee v. Hoxie*, 29 Barb. 547.

If the defendant notices and moves the cause for trial, and the plaintiff is not ready on the first call of the calendar, the defendant may take his default, on any day of the term, if the plaintiff

Defendant's default.

fails to perform the conditions imposed as the ground of delay. *Moffatt v. Ford*, 14 Barb. 577.

If the plaintiff fails to appear at the trial, the defendant may try the cause before the court without a jury, as the failure to appear is a waiver of a jury. Code, § 266. See *Haines v. Davis*, 6 How. 118; 1 Code R. N. S. 407; *Goodyear v. Baird*, 11 id. 377.

c. Defendant's default. If the plaintiff has noticed the cause, and had it put upon the calendar, and the defendant fails to appear, the plaintiff's counsel may read proof of the due service of the notice of trial, after which he may produce his evidence to prove the material allegations in his complaint, which are denied in the answer.

The plaintiff cannot take a judgment without evidence where the answer puts in issue the allegations in his complaint. *Patten v. Hazewell*, 34 Barb. 421.

If, however, the answer does not deny any of the allegations in the complaint, but sets up an affirmative defense, such as a counter-claim, a set-off, or any other affirmative defense, the plaintiff's right to recover will be admitted by the pleadings, and no evidence will be required to prove a cause of action.

It may be that some evidence will be required upon the question of damages, and, in that event, the plaintiff will need to be prepared to introduce such proof before taking a verdict.

By not denying the complaint the defendant admits its truth, and by not appearing and proving his defense, he admits the plaintiff's right of action, leaving the amount to be properly assessed upon such evidence as may be introduced.

If the case is one in which the taking of an account, or the proof of any fact is necessary to enable the court to give judgment, the court may take the proof, or may, in its discretion, order a reference for that purpose. Code, § 271.

The defendant, by his default, waives his right to a jury, and the plaintiff may prove his case before the court without a jury. *Haines v. Davis*, 6 How. 118; 1 Code R. N. S. 407; *Goodyear v. Baird*, 11 id. 377; Code, § 266.

If the plaintiff elects to dispense with a jury, and to try the cause before the court, he cannot have the damages assessed by a sheriff's jury, in pursuance of an order entered for that purpose. *Giberton v. Fleischel*, 5 Duer, 652. In such a case the court which hears the evidence must assess the damages. *Ib.*

Proceedings upon default — Opening default.

d. Proceedings upon default. In the observations under letters *b* and *c*, many of the ordinary proceedings are explained, and yet a few other matters require notice in this place. If a jury is impaneled, the plaintiff opens his case, then introduces his evidence, and, under the direction of the court, takes a verdict. Except that the proceedings are *ex parte*, they are similar to any other trial by jury.

If the trial is by the court, it is conducted like other trials before the court without a jury, except that no defense is made. The decision of the court must be in writing, and contain a statement of the facts found and the conclusions of law separately, and must be filed with the clerk within twenty days after the court. Code, § 267.

Judgment upon the decision must be entered four days thereafter. *Ib.*

But, before rendering a decision, the court may order a reference, instead of hearing the evidence in court. If the rights of the parties depend upon the examination or stating of a long and complicated account, as in actions between partners, or against trustees, or upon ascertaining the existence and priority of specific or general liens upon real estate, and deducing title thereto, as in partition cases and the like, a reference is usually a matter of course, and final judgment is in the mean time suspended.

If no reference is ordered, and the decision will dispose of the entire case, final judgment is entered upon such decision when filed. Code, §§ 267, 280; *Schenectady and Saratoga Plank Road Co. v. Thatcher*, 6 How. 226; 1 Code R. N. S. 380; *Lynde v. Cowenhoven*, 4 How. 327; 3 Code R. 7; *Thomas v. Tanner*, 14 How. 426.

If a reference is ordered for any purpose, an order of reference must be duly drawn up and entered, and stating specifically the matters referred to the referee; and the decision, signed by the judge, containing all the points of the case actually passed upon and decided by him, must also be filed. For the proceedings on such reference, see Interlocutory Decrees and Orders. As to the entry of judgment on the report, see Judgment on Interlocutory Order, Decree, etc.

e. Opening default. This subject has been fully discussed elsewhere. See Inquest, Default, Judgment by Default.

Section 10. Postponement of causes.

a. In general. It may be that both parties are willing to try the cause, and yet the absence of some witness, deposition or document, or of counsel, may render a postponement of the cause necessary. Such an application may be made by either party, upon showing sufficient grounds by affidavit. The postponement may be a brief one, as to some later day in the circuit; or, it may be to the next circuit, according to the circumstances of the case. It is only upon the application of a party that the cause is usually postponed. And the court is not at liberty to refuse to try a cause when duly reached on the calendar, merely because the cause has before been tried by him, and sent back for a new trial. *Fry v. Bennett*, 3 Bosw. 200; 9 Abb. 45; affirmed, 28 N. Y. (1 Tiff.) 324.

By proceeding to trial, there is sometimes a waiver in relation to previous irregular proceedings, or to some advantage possessed. And, if the defendant has procured a stay of proceedings, by going on with the trial he will waive the stay. *Hasbrouck v. Ehrich*, 7 Abb. 76. So previous irregularities in the practice will be waived by proceeding with the trial. *D'Ivernois v. Leavitt*, 8 Abb. 59; *Phillips v. Burr*, 4 Duer, 113; *Wall v. Buffalo Water Works Co.*, 18 N. Y. (4 Smith) 119.

b. By plaintiff. It is a natural presumption that the plaintiff will be ready for trial at the calling of the cause in its order on the calendar. He is presumed to be possessed of evidence sufficient to maintain his action, from the very fact that the action has been commenced by him. If, however, for any cause, the plaintiff is unprepared for trial, he may proceed to obtain a postponement thereof until such time as he may be able to proceed with safety to his interests.

If the causes which render a postponement of the trial necessary are of a mere temporary character, which may be removed before the close of the circuit, the plaintiff should apply to the court upon affidavit for the postponement of the cause until a subsequent day of the circuit. The affidavit should set forth explicitly the nature of the obstacles to the immediate trial of the cause, such as the absence, or sudden illness of a witness, whose attendance may probably be procured in a few days, or any other similar reason for asking temporary delay.

If it appears from the affidavit that there are sufficient reasons for the postponement, and that the plaintiff has been guilty of

Postponement — By defendant.

no laches in preparing for trial, the application will, as a general rule, be granted.

If the reason for asking for a postponement is the absence of a witness who has been duly subpoenaed, it will rest in the discretion of the judge whether he will suspend the trial until the witness can be brought in by attachment, or otherwise. *Rapelye v. Prince*, 4 Hill, 119.

If the plaintiff is not prepared for trial on the calling of the cause, the usual course is to allow it to go off, or to pass it and then stipulate to try it at the next circuit, or on a subsequent day of the same circuit, unless the court, for good cause shown, excuses the plaintiff from stipulating.

On the calling of the cause, the counsel for the plaintiff should read his affidavit and move thereon that the cause be put off to the next circuit. The application will usually be granted on terms.

c. By defendant. Applications for the postponement of trials are most frequently made by the defendant, and often originate in a desire to delay the enforcement of a demand, against which he has no valid defense.

If, however, the defendant is for any good reason unable to proceed with the trial when the cause is called, he should apply to the court for a postponement.

The defendant will be allowed a postponement on substantially the same grounds as would entitle the plaintiff to a similar favor.

The application should be made on an affidavit setting forth the reasons why a postponement is necessary ; as the sickness or absence of a material witness, the illness of his attorney, or the like. These reasons should be stated in such a manner as to overcome the presumption that the application is made for the mere purpose of delay, especially if it is a case where the cause has been once postponed for the same reasons, or where the circumstances of the case are such as to excite in the mind of the court a suspicion that the application may not be made in good faith. See *People v. Vermilyea*, 7 Cow. 369 ; *Ogden v. Payne*, 5 id. 15 ; *Hooker v. Rogers*, 6 id. 577.

The importance of obtaining a postponement of the trial where one or more of the material witnesses are absent, cannot well be over-estimated ; for, where the defendant is apprized that there is a material witness, whose appearance he cannot procure

 Grounds of postponement.

in time, and yet goes to trial without his testimony, and a verdict is found against him, the court will not grant a new trial for the purpose of letting in the evidence of the witness. *Jackson v. Malin*, 15 Johns. 293; *People v. Superior Court of New York*, 5 Wend. 114.

d. Grounds of postponement. There are several grounds upon which either party may obtain a postponement of the trial. First among these is the absence of one or more material witnesses.

The mere absence of a witness, when the cause is called for trial, is not of itself a ground for postponement. Before the court will entertain an application for a postponement of the trial on account of the absence of a witness, it must appear, 1. That the witness is material; 2. That there has been no laches in procuring his attendance; and 3. That there is reasonable ground to suppose that his attendance can be procured at the time to which it is proposed to put off the trial. If these three facts can be made to appear, the party will be entitled to a postponement as a matter of right, founded upon what has become a principle of the common law. *People v. Vermilyea*, 7 Cow. 369; *The King v. D'Eon*, 1 W. Bla. 510; S. C., 3 Burr. 1513. But where there has been laches, or there is reason to suspect that the object is delay, the postponement ceases to be a matter of right, and the judge may then take into consideration all the circumstances, and grant or deny the application in the exercise of a sound discretion. *People v. Vermilyea*, 7 Cow. 369; *Ogden v. Payne*, 5 id. 15; *Leggett v. Boyd*, 3 Wend. 376; *Brooklyn Oil Works v. Brown*, 7 Abb. N. S. 382; S. C., 38 How. 451; *Fountain v. Anderson*, 33 Ga. 372; *Turner v. Merryweather*, 7 Man., Gr. & Sc. 251.

Prima facie, the absence of a material witness from the State is a good ground for the postponement of a trial, although, as will be afterward shown, that fact will not in all cases be sufficient to give a party an absolute right to a postponement. *People v. Vermilyea*, 7 Cow. 369; *Ogden v. Payne*, 5 id. 15; *Vermilyea v. Rogers*, 4 Hill, 567; *Brown v. Murray*, 4 Dowl. & Ryl. 830. But as the object of a postponement is to enable the party to procure the evidence necessary to sustain his action or establish his defense, the absence of the witness will be no ground for postponement if it is not probable that the witness

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will return to the State. *The King v. D' Eon*, 1 W. Bla, 510; S. C., 3 Burr. 1513. See *People v. Vermilyea*, 7 Cow. 383.

Laches in procuring the attendance of a witness, who has left the State, will also defeat the right to a postponement on that ground. Thus, a postponement will be denied, where the absent witness did not go abroad until after the notice of trial was given and the party desiring his testimony had an opportunity to subpoena him in sufficient time. *Barnes*, 442; *Davidson v. Brown*, 4 Binn. 243. So a postponement will be denied where the application is made on the ground of the absence of a material witness, when no application has been made to the witness to know whether he will attend. *Worsley v. Bissett*, 3 Dougl. 58. The rule will be the same if the neglect to subpoena the witness arose from his promise to attend at the trial. *Freeland v. Howell*, Anth. N. P. 272. The denial of a postponement on the ground of the absence of a material witness will always follow the laches of the party who has not procured the testimony of the witness when he had power to do so. *Wright v. McGuffie*, 4 C. B. N. S. 441. See *Ward v. Wilkinson*, 2 F. & F. 173. And so where there have been prior postponements of a cause on the ground of the absence of a material witness from the State, a further postponement will be denied, if the witness is in the employ of the party desiring his testimony, and is absent attending to his business. *Wright v. McGuffie*, 4 C. B. N. S. 441.

If due diligence has been used in attempting to procure the attendance of a material witness since issue joined, but without effect, a postponement will be granted, although the party might have procured the attendance of the witness by due diligence exercised at an earlier day. A defendant cannot be presumed to know what evidence will be required, until after issue joined. *Dale v. Heald*, 1 Car. & Kirw. 314. This rule will not apply, however, where the material witness is the party defendant, even though his absence occurred prior to the joining of issue. *Solomon v. Howard*, 12 C. B. 463.

A motion to postpone a trial, on the ground of the absence of a material witness, will be denied if based on the bare affidavit that the parties have been endeavoring to find the witness and cannot. *Anonymous*, Lofft. 653.

Absence of a material witness, on account of sickness, is as valid a ground for a postponement as absence from the State. *Hooker v. Rogers*, 6 Cow. 577.

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So a cause may be postponed to allow a defendant an opportunity to obtain material and necessary documentary evidence. *Mackenzie v. Hudson*, 1 Dowl. & Ryl. 159.

If a party has had an opportunity to examine a transient witness, the want of his testimony will furnish no ground for a postponement of the trial. *McKay v. Marine Ins. Co.*, 1 Cai. 384. See *Hays v. Berryman*, 6 Bosw. 679. So where the improper delay of the party, for the purpose of taking an unfair advantage of his opponent, has been the cause of delaying the trial until the absence of a material witness occurs, the absence of the witness will not be deemed a sufficient ground for the postponement of the trial. *Saunders v. Pittman*, 1 Bos. & Pul. 33. A postponement will also be denied when the defense, intended to be introduced by the absent witness, is one deemed odious, as, where the action was for services, and the defense was that the plaintiff was a slave at the time of rendering the services. *Robinson v. Smyth*, 1 Bos. & Pul. 454.

When a material witness is prevented from attending the trial by the fraud and practice of the adverse attorney, this absence will be a ground for postponement. *Turquand v. Dawson*, 1 Crompt., Mees. & Rosc. 709; 5 Tyrw. 448.

The absence of counsel is sometimes deemed a ground for postponement, but the courts will grant an application on that ground with reluctance, and only where the absence arises from necessity or misconception. *Jackson v. Wakeman*, 2 Cow. 578; *Post v. Wright*, 1 Cai. 111; *M'Kay v. Marine Ins. Co.*, 2 id. 384; *Sayer v. Finck*, id. 336; *Rogers v. Garrison*, id. 379.

The illness of an attorney for the party is usually a ground for postponement. *Hayley v. Grant*, Sayer, 63. See *Koy v. Clough*, 2 Cai. 381. Absence of counsel on professional business is not a ground for the postponement of a trial (*Jackson v. Wakeman*, 2 Cow. 578), or, if it is so regarded, the cause will not be postponed beyond the term or circuit. *Hake v. Edgerton*, 6 Duer, 653.

The publication of an article relating to the subject-matter of the controversy, immediately before the day fixed for the trial, and with intent to influence the jury, has been deemed a ground for postponement. *Rex v. Gray*, 1 Burr. 499, 510; *King v. Jolliffe*, 4 Term, 285; *Coster v. Merest*, 3 Brod. & B. 272. But where the publication consisted in a mere newspaper report of the remarks of a judge on an application for a new trial, to the effect

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that the verdict of the jury on the former trial was incorrect, a postponement was denied, although it was intimated that if the report was a misrepresentation, or had been accompanied by inflammatory remarks or observations, it might have been a ground for postponing the trial until the agitation occasioned by it had subsided. *Willis v. Farrer*, 3 Young. & Jerv. 381.

The fact that the cause has once been tried before the same judge is no ground for postponement. *Fry v. Bennett*, 3 Bosw. 200; S. C., 9 Abb. 45; *Willis v. Farrer*, 3 Young. & Jerv. 381.

The arrest of a party when on his way to attend the trial of his cause is a good ground for postponement until his release. *Solomon v. Underhill*, 1 Camp. 229.

e. Application for. The application to put a cause over the term may be made when the cause is called in its order, or at any time before, without notice, if the attorney of the adverse party is present. Usually upon the calling of the cause, the party desiring the postponement reads his affidavit, setting forth the reasons why he cannot safely proceed to trial, and moves thereon for a postponement.

f. Affidavit — requisites and form. A motion for a postponement must be based upon an affidavit, and will not be entertained on a statement *ore tenus*. *Smith v. Barker*, 3 Day, 280; *Brooklyn Oil Works v. Brown*, 7 Abb. N. S. 382; S. C., 38 How. 451.

If the ground upon which the application is made is the absence of a material witness, the affidavit must show, 1. That the witness is material; 2. That the party has been guilty of no laches in attempting to secure his attendance; and, 3. That the attendance of the witness can be procured at the time to which it is proposed by the moving party to postpone the trial. *People v. Vermilyea*, 7 Cow. 369; *Brooklyn Oil Works v. Brown*, 7 Abb. N. S. 382; S. C., 38 How. 451; *Rex v. D'Eon*, 1 W. Bla. 510; S. C., 3 Burr. 1513. The materiality of the witness may be shown by a statement of the party that he cannot safely proceed to trial without him, as he is advised by counsel and verily believes. *Brooklyn Oil Works v. Brown*, 7 Abb. N. S. 382; S. C., 38 How. 451; *People v. Vermilyea*, 7 Cow. 369.

Whether a defendant, in moving for a postponement, must include in his affidavit the essentials of an affidavit of merits, has been a question of much dispute. In the earlier English cases it was held necessary to swear to merits. *Zoffani v. Jennings*, Loft. 187; *The King v. Radcliffe*, 1 W. Bla. 3; S. C., 1 Wils.

150; *Fost. Cr. L.* 40. But this rule has been uniformly disregarded in the later English decisions, and the contrary rule asserted. *Attorney-General v. Hull*, 2 Dowl. Pr. Cas. 111; *Hill v. Prosser*, 3 id. 704; *McCauley v. Thorpe*, 1 Chitty, 685; *Cookson v. Simpson*, id., note. In the earlier decisions of the courts of this State, an affidavit of merits was not required. *People v. Vermilyea*, 7 Cow. 369; *Hooker v. Rogers*, 6 id. 577; *Ogden v. Payne*, 5 id. 15; *Pulver v. Hiserodt*, 3 How. 49. But, since an affidavit of merits has been declared necessary in a recent decision, it may be advisable, as a matter of precaution, to swear to merits in the affidavit on which the application for the postponement of the trial is based. See *Brooklyn Oil Works v. Brown*, 7 Abb. N. S. 382; S. C., 38 How. 451.

An affidavit, which briefly states the reasons why an absent witness has not been obtained, that the party expects to be able to procure his attendance thereafter, and that without his testimony the party cannot safely proceed to trial as he is advised by counsel, and believes, is termed a common or general affidavit.

This affidavit will be sufficient if the application for a postponement is the first that has been made in the cause by the moving party, unless circumstances appear which give cause for suspicion that the object is delay. *People v. Vermilyea*, 7 Cow. 369; *Brooklyn Oil Works v. Brown*, 7 Abb. N. S. 382; S. C., 38 How. 451; *Hooker v. Rogers*, 6 Cow. 577; *Ogden v. Payne*, 5 id. 15; *Pulver v. Hiserodt*, 3 How. 49.

If the allegations contained in this affidavit are not defeated by counter affidavits, the party will be entitled to a postponement. *Ib.*

But if there has already been a postponement of the trial at the instance of the party soliciting a further postponement, or any other circumstance raising a suspicion that his application is merely for delay, he must then present a special affidavit. *Ib.*

The special affidavit must state the cause of action, and the evidence expected from the witness, in order that the court may judge whether it is material. *People v. Vermilyea*, 7 Cow. 369; *Brooklyn Oil Works v. Brown*, 7 Abb. N. S. 382; S. C., 38 How. 451; *Dean v. Turner*, 31 Md. 52; *King v. Jones*, 8 East, 31; *Lord v. Cooke*, 1 W. Bla. 436.

The affidavit should also state circumstances from which the court may infer the probability of the return of the witnesses within a reasonable time. *The King v. D' Eon*, 1 W. Bla. 510;

Postponement—Form of common affidavit.

S. C., 3 Burr. 1513; *People v. Francis*, 38 Cal. 183; *Ubanks v. State*, 41 Ill. 486; *Byne v. Jackson*, 25 Tex. 95; *State v. Rorabacher*, 19 Iowa, 154. The affidavit need not state when the witness was subpoenaed unless this is made a ground of objection. *Hooker v. Rogers*, 6 Cow. 577.

Under the English practice it is unnecessary to state the name of the witness, on account of whose absence the party cannot proceed to trial. *Smith v. Dobson*, 2 Dowl. & Ryl. 420; *Buckingham v. Banks*, 4 id. 832. But in this State the name of the absent witness is usually disclosed, although there seem to be no reported decisions declaring it essential. It will be advisable to state the name of the absent witness in the affidavit, even if it is not strictly necessary. See *Smith v. Barker*, 3 Day, 280; *Carey v. Philadelphia, etc., Petroleum Co.*, 33 Cal. 694; *Webb v. State*, 21 Ind. 236; *Huff v. Freeman*, 15 La. An. 240.

As a general rule, the affidavit upon which a motion for a postponement is based must be made by a party. *Carter v. Uppington*, Barnes, 437. In certain cases, however, the affidavit may be made by the attorney (*Duberly v. Gunning*, Peake's Cas. 97), or by his clerk, if he was particularly acquainted with the circumstances of the cause, and had the management of it. *Sullivan v. Magill*, 1 H. Bla. 637. But in such cases the affidavit must state that he had, in fact, the management of the cause, and was particularly acquainted with the circumstances. *Ib.*

In no case will the affidavit of the clerk be received without sufficient excuse. *Chase v. Edwards*, 2 Wend. 283; *Bird v. Moore*, 3 Hill, 447.

Form of common affidavit.

(*Title of cause.*)

(*Venue.*)

A. B., being duly sworn, says:

I. That he is the defendant in this action.

II. That issue was joined herein on the _____ day of _____, instant; and that notice of trial was served by the plaintiff on the next day.

III. That E. F., of the town of _____, in the said county, is a material witness for him, the deponent, in this cause, without whose testimony he cannot safely proceed to the trial thereof.

IV. That deponent has fully and fairly stated to _____, Esq., his counsel herein, who resides at _____, the case in this cause, and the facts which he expects to prove by the said E. F.

 Postponement — Opposing application.

V. That deponent is advised by his said counsel, after such statement, and verily believes, that the said E. F. is a material witness for deponent, and that without his testimony deponent cannot safely proceed to the trial of this cause.

VI. And this deponent further says, that he has a good defense upon the merits in this cause, as he is also advised by his said counsel and verily believes.

VII. And this deponent further says, that, in consequence of the notice of trial aforesaid, this deponent caused immediate inquiry to be made at the residence of the said E. F., with a view to have him subpoenaed; but was there informed by his wife that he had gone to Philadelphia, in the State of Pennsylvania, and was not expected to return home until the day of next, at which time the deponent verily believes he will return.

VIII. And this deponent believes that he will be able to procure the attendance of the said E. F., as a witness in this cause, at the next circuit court to be held in and for the said county of

(*Jurat.*)

(*Signature.*)

g. Opposing application. The application for a postponement may be opposed by counter-affidavits showing that the statements in the moving papers are untrue, or by showing that the papers themselves are defective, in some essential particular, or that the application is not made in good faith, or that the case is not a proper one for granting a postponement.

If the postponement is sought on the ground of the absence of a material witness, the opposing party may defeat the motion by offering to admit the facts to which the absent witness is expected to testify. *Brill v. Lord*, 14 Johns. 341; *Brooklyn Oil Works v. Brown*, 7 Abb. N. S. 382; S. C., 38 How. 451. But the application cannot be defeated by an admission that the absent witness, if present, would swear as alleged by the moving party. *People v. Vermilyea*, 7 Cow. 369; *De Warren v. State*, 29 Tex. 464.

Where the moving papers state what it is expected an absent witness would testify, and the party opposing the application admits the truth of the facts so stated, he will be afterward precluded from giving evidence contradictory to such facts. *Brent v. Heard*, 40 Miss. 370.

An affidavit showing that the unfair conduct of the moving party was the cause of the delay of the trial until the absence of the material witness occurred, will also defeat a postpone-

Postponement — Decision on application.

ment. *Saunders v. Pittman*, 1 Bos. & Pul. 33; *Almgill v. Pierson*, id. 103.

The motion may also be successfully opposed by counter-affidavits stating circumstances that render it impossible or improbable that the evidence of the absent witness can be obtained within a reasonable time. *Anonymous*, 3 Day, 308.

The materiality of the evidence expected from an absent witness cannot, however, be successfully denied on counter affidavits. *Ib.* But if it appears from the affidavits of the moving party that the proposed evidence is not material, the application will be denied. See *People v. Smith*, 3 Wheel. Cr. Cas. 172, 176; *The Territory v. Nugent*, 1 Mart. (La.) 108; *The King v. D' Eon*, 3 Burr. 1513; S. C., 1 W. Bla. 436; *Harper v. Lamping*, 33 Cal. 641.

The admissibility of the proposed evidence will not be considered by the court on a question of postponement. *Mackenzie v. Hudson*, 1 Dowl. & Ryl. 159. The importance of the proposed testimony will, however, be considered in deciding the motion to postpone. *Chambers v. Hadley's Heirs*, 3 J. J. Marsh. 98; *State v. Klinger*, 43 Mo. 127. The fact that the proposed witness is, or has been, the attorney for the moving party, and may have acquired his knowledge from communications made to him professionally, and therefore may refuse to be sworn, is not a ground for opposing a postponement. *Ogden v. Payne*, 5 Cow. 15. See *Beatty v. Sylvester*, 3 Nev. 228.

The motion may be successfully opposed by showing lack of due diligence on the part of the moving party to obtain the testimony of an absent witness. The failure of the party to take the testimony of a transient witness *de bene esse*, is a good ground for opposing the motion, if the party had the power to do so previous to the trial. *McKay v. Marine Ins. Co.*, 2 Cal. 384; *Hooker v. Rogers*, 6 Cow. 577. But it is in general no answer to the application that the party had an opportunity to examine a sick witness *de bene esse*, where the witness is not a transient or sea-faring person.

h. Decision on application. The proper disposition of a motion for a postponement is not a question unattended with difficulty. As has previously been stated, in a case where the common affidavit applies, the court has no discretion, and a postponement is a matter of right, resting on what has become a principle of the common law. But where there has been laches,

Postponement — Decision on application.

or there is reason to suspect that the object is delay, the judge at the circuit may then take into consideration all the circumstances of the case, and grant or deny the application in his discretion. *People v. Vermilyea*, 7 Cow. 369. There are few cases in which the judge at the circuit is not called upon to exercise his discretion in deciding a motion for a postponement, as it seldom happens that a postponement is a matter of strict right. As has been well remarked by Justice NOTT, of South Carolina, "The various shifts to which a party will frequently resort to effect the postponement of a case; the perseverance with which one will press for a trial when he finds his antagonist unprepared; the zeal with which the counsel will enter into the feelings of their clients; and the difficulty of getting at the truth when each party is determined to take all advantages of the other which circumstances may throw in his way; all combine to render a question of postponement one of the most difficult and embarrassing that is met with in the administration of justice. And, although there are certain general rules by which the courts are usually governed, yet, among the infinite variety of circumstances which contribute to render a case an exception to the general rule, almost every one may be resolved into a question of discretion which must be governed by its own particular circumstances. And there would be no end of delay if the court were not permitted to exercise a liberal discretion in laying the parties under such reasonable terms as are calculated to facilitate the progress of a suit, and to promote the ends of justice." *Farrand v. Bouchell*, 1 Harp. 85.

While it must be admitted that the allowance or denial of a postponement is in most cases within the discretion of the judge at circuit, it must also be admitted that the discretion is not arbitrary, but is controlled and regulated by fixed principles of practice. *Brooklyn Oil Works v. Brown*, 7 Abb. N. S. 382; S. C., 38 How. 451.

As a general rule, where a witness for a party fails to appear at the time appointed for the trial, if such party shows that a subpoena for the witness has been returned executed, or, if not so returned, was delivered to the proper officer of the county or corporation in which the witness resides, a reasonable time before the trial, and shall swear that the witness is material and that he cannot safely go to trial without his testimony, a postponement ought to be granted, if there are reasonable grounds to believe

Postponement—Terms imposed.

that the attendance of the witness at the next term can be secured, especially if there has been no prior postponement for the same cause. But where the circumstances satisfy the court that the real purpose in moving for a continuance is to delay or evade a trial, rather than to prepare for it, then, though the witnesses have been subpoenaed and the party has sworn to their materiality, and that he cannot safely go to trial without them, the postponement should be denied. *Hewitt v. Commonwealth*, 17 Gratt. (Va.) 627.

i. Terms imposed. On an application to postpone a trial, the judge may, as a condition of granting the order, require the payment to the adverse party of a sum not exceeding \$10, besides the fees of witnesses. Code, § 314. The costs imposed cannot, however, exceed that amount. *Noxon v. Bentley*, 6 How. 418. See *Keil v. Rice*, 24 id. 228.

Terms other than the payment of costs may, however, be imposed as a condition of granting the postponement.

Thus, on an application by a defendant for a postponement, the court denied the application, unless the defendant would stipulate to allow an inquest on the next adjourned day, if he was not ready to proceed. *Brooklyn Oil Works v. Brown*, 38 How. 451; S. C., 7 Abb. N. S. 382. So, in an action of tort, where the defendant asked to put off the trial for want of witnesses, and it appeared that the moving party was laboring under a mortal malady, and that there was just cause to apprehend that he might die previous to the next circuit, the judge required the defendant's counsel to stipulate, as a condition of putting off the trial, that the action should not abate, if the defendant should happen to die previous to the next circuit. *Ames v. Webbers*, 10 Wend. 576; 11 id. 186. So, also, the plaintiffs in replevin were required by the court, as a condition of the postponement of a trial, to renew their sureties on the bond to the sheriff, given on the institution of the suit. *Decker v. Judson*, 16 N. Y. (2 Smith) 439. So in a libel cause, to which justification was pleaded, the court postponed the trial, to enable the defendant to procure witnesses from abroad, but imposed the terms of his undertaking to admit on the trial the publication of the alleged libel. *Brown v. Murray*, 4 Dowl. & Ryl. 830.

It is only in extreme cases, in which the rights of the adverse party may be endangered by the postponement of the trial, that stipulations will be imposed as a condition of granting the order.

Costs — Form of order of postponement.

In ordinary cases, if a proper case is presented for putting off the trial, nothing further will be required than the payment of the costs of the circuit. *Hall v. Dwinell*, 10 Wend. 628.

j. Costs. If the postponement is granted on the condition of the payment of the costs of the circuit, the moving party has twenty days in which to make payment, unless the time of payment has been otherwise fixed by the court. But where the costs to be paid have not been adjusted, the party is allowed fifteen days in which to comply with the order, after the costs have been adjusted by the clerk on notice, unless otherwise directed. Rule 32, Sup. Ct. It is the duty of the party moving for the postponement to seek the adverse party, and tender the costs imposed as a condition of granting the order, without waiting for a formal demand of them. *Jackson v. Pinkney*, 19 Johns. 270. See *Bulkeley v. Keteltas*, 2 Sandf. 735.

When a party obtains a postponement of the trial of a cause on payment of costs, his adversary may insist on having the trial proceed, on omission to pay; or he may waive that right, and either compel payment by precept in the nature of a *feri facias*, or include them in his general bill in case he ultimately succeeds in the action. *Gamble v. Taylor*, 43 How. 375.

k. The order, its requisites and form. The order directing the postponement of the trial, should state the time to which the cause is put over, and specify the terms upon which the order is granted. If the order is granted on the payment of costs, the order should be made conditional on a compliance with the order, as the circuit judge has no power to make a direct order for the payment of costs. *Bagley v. Ostrom*, 5 Hill, 516. The order may direct that the trial be postponed upon the payment of costs within a certain time, or that judgment absolute be entered against the party in case he should accept the favor and make default in complying with the condition upon which it was granted. *Booth v. Whitby*, 5 Hill, 446.

Form of order of postponement.

(Title of cause.)

On reading and filing the affidavit of _____ and on motion of _____, of counsel for the _____, and after hearing _____ of counsel for the _____ in opposition,

ORDERED: That the trial of this cause be put off until the next circuit court to be held of this county on the immediate payment by the _____, of \$ _____, the costs of this circuit.

(Signature of judge.)

 Relief if postponement refused — Incidental applications.

l. Relief if postponement refused. The practice on applying for relief where a postponement has been refused on the trial, is in some respects the same whether the trial was by the court or by a jury.

Thus, where a party defendant feels himself aggrieved, by a refusal to postpone the trial, whether such refusal be made on a trial by jury, or a trial before the court, he may withdraw from the trial, and if the trial proceeds and the cause is decided against him, he may, upon affidavits showing the application to postpone, the papers upon which it was founded, its denial, and that a decision has been made against him, make a non-enumerated motion at special term to set aside such decision; he may also remain and try the cause on the merits, and in case of a decision against him, either pursue the same course to obtain a new trial, or may, if the trial was by jury, under section 265, move at special term, on a case, for a new trial, alleging as one of the grounds of error, the refusal to postpone the trial; or, if the trial were by the court, then under section 268, may appeal directly to the general term, alleging as cause for reversal the refusal to postpone. *Howard v. Freeman*, 7 Rob. 25; S. C., 3 Abb. N. S. 292; *Ogden v. Payne*, 5 Cow. 15; *Hooker v. Rogers*, 6 id. 577; *People v. Vermilyea*, 7 id. 369; *Brooklyn Oil Works v. Brown*, 38 How. 451; S. C., 7 Abb. N. S. 382; *Miller v. Porter*, 17 How. 526.

An appeal from an order refusing a postponement is never proper where the trial is by jury. *Ib.*

Section 11. Incidental applications.

a. Objecting to jurisdiction. If it appears upon the face of the complaint that the court has no jurisdiction of the person of the defendant, or of the subject-matter of the action, the defendant may raise the objection for the first time upon the trial, and move for judgment of dismissal before or after entering upon the trial. An objection to the jurisdiction of the court is not waived by a failure to raise the objection by demurrer or answer. Code, § 148. A lack of jurisdiction is an incurable defect to which an objection may be raised, even after verdict and on appeal. See *Valarino v. Thompson*, 7 N. Y. (3 Seld.) 576; *Burnham v. De Bevoise*, 8 How. 159; *Griffin v. Dominguez*, 2 Duer, 656; S. C., 11 N. Y. Leg. Obs. 285.

If the objection to jurisdiction has not been previously taken, the proper time to raise the objection is when the cause is called

Objecting to want of parties — Suppressing deposition.

and before entering upon the proofs. The remedy of the party is by motion for a dismissal of the complaint.

b. Objecting to want of parties. The general discussion of the subject of parties to action has been incorporated in a preceding volume. See vol. 1, p. 88.

As has been there stated, if there is a lack of parties apparent upon the face of the complaint, the defendant's remedy is by demurrer. Or where such defect exists, but is not apparent upon the face of the complaint, the remedy is by answer. If the objection is neither raised by demurrer nor answer, it will be waived. *Id.* 119, 139.

It sometimes occurs that the court finds it necessary, on its own motion, to let a cause stand over for the purpose of amendment, by adding and bringing in parties, after the trial has been commenced, or even completed. While the Code authorizes the court to determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights, it also provides that, when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. *Id.* 161-165; Code, § 122.

When it appears on the hearing that the presence of other parties is necessary to a complete determination of the controversy, it is the imperative duty of the court to order them to be brought in, and to order the cause to stand over for that purpose, even though no objection has been raised by either party. *State of New York v. Mayor, etc., of New York*, 3 Duer, 119; *Davis v. Mayor, etc., of New York*, 2 *id.* 663.

The mode of bringing in other parties, whether on motion of the court or otherwise, has been already pointed out. Vol. 1, p. 163-165. Where an order has been made, directing other parties to be brought in, the process and pleadings must be amended accordingly, and due service made on the parties.

c. Suppressing deposition. Where a notice of a motion to suppress a deposition has been served, it is customary to bring on the motion before entering upon the trial of the cause. After hearing the counsel upon each side, the court will decide at once as to the admissibility of the deposition, or will allow it to be read conditionally, reserving the question of admissibility until the final disposition of the cause. As to the practice in such cases, see Evidence, vol. 2, 671, 704.

Objections to pleadings—Trial and its incidents.

d. Objections to pleadings. There are but two objections which can be taken to a pleading on the trial; the one, that the court has no jurisdiction of the action, and the other, that the complaint does not state facts sufficient to constitute a cause of action. *Winterson v. Eighth Avenue R. R. Co.*, 2 Hilt. 389; *Luddington v. Taft*, 10 Barb. 447. Either of these objections may be raised for the first time upon the trial, and will not be waived by an omission to demur. *Coffin v. Reynolds*, 37 N. Y. (10 Tiff.) 640; S. C., 5 Trans. App. 74; Code, § 148.

The practice of taking objections to a pleading on the trial is not favored by the courts. *Smith v. Countryman*, 30 N. Y. (3 Tiff.) 655; *Meyer v. Fiegel*, 34 How. 434; S. C., 7 Rob. 123.

When, from any reason, it may be deemed necessary to object at the circuit to a pleading, on the ground that it does not state facts sufficient to constitute a cause of action, the objection should be taken before entering upon the trial. If, on the other hand, the defendant fails to object to the sufficiency of the complaint until the plaintiff has closed his case, and evidence has been given establishing a cause of action, the court may allow the complaint to be amended, and overrule the objection. *Meyer v. Fiegel*, 34 How. 434; S. C., 7 Rob. 123.

An objection to an answer that it does not set up matter sufficient to constitute a defense or counter-claim, cannot, however, be raised upon the trial by motion to strike it out. A judge has no power to strike out pleadings on the trial. If the plaintiff omits to demur to an answer or defense, it must, for the purposes of the issue, be deemed sufficient in law, subject to the power of the court to reject evidence which, if received, could not constitute a defense or counter-claim. *Smith v. Countryman*, 30 N. Y. (3 Tiff.) 655. The court may, in effect, disregard an immaterial issue by excluding the evidence offered in support of it. But, unless the case is a very clear one, the court will leave the party to his motion for a new trial, or an appeal. *Ib.*

Section 12. Trial and its incidents.

a. In general. The Code provides that either party giving the notice may bring the issue to trial, and, in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict or judgment, as the case may require. Code, § 268. It also provides that a separate trial, between a plaintiff

Trial and its incidents — Reference on the trial.

and any of the several defendants, may be allowed by the court whenever, in its opinion, justice will thereby be promoted. *Ib.*

To carry this provision into effect, it is further provided that, in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. Code, § 274.

The interests of the parties to be thus severally tried must be either several or severable. The same rule applied to actions prior to the Code. A several trial and judgment, before the Code as well as since its adoption, was proper in an action against the maker and indorser of a note, and in all similar cases. But a several judgment against joint debtors or contractors, not by their contract severally liable, was not proper before the Code, nor is it now. *People v. Cram*, 8 How. 151; *Fullerton v. Taylor*, 6 id. 259; S. C., 1 Code R. N. S. 411. Neither has the court power to divide an action of foreclosure, and render a contingent judgment for the balance of the debt remaining unsatisfied after a sale of the mortgaged premises, previous to the rendition of the principal judgment for a foreclosure and sale of the premises mortgaged. *Cobb v. Thornton*, 8 How. 66. Nor can an action against several defendants be brought to trial against one or more of them before it is in readiness for a hearing as against all. It cannot be tried in sections without leave of the court. *Ward v. Dewey*, 12 How. 193. Nor where an action is at issue as against all of several defendants, can any one of them give notice of trial, and, upon the failure of the plaintiff to appear, take a judgment against him by default. The cause must not only be in readiness for trial as between all the parties to the action, but it must also have been noticed by all the defendants who have a right to appear upon the trial. If there are several defendants who are each entitled to notice of trial, all must have notice before the plaintiff can move on the trial. On the other hand, all the defendants must have given notice of trial to the plaintiff before any of them can move the trial as against the plaintiff. *Ib.* Though the court may permit a defendant who has a distinct and separate defense, to bring the cause to trial, and, in a proper case, take a dismissal of the complaint. See *ante*, 6, 7.

b. Reference on the trial. The subject of moving for a reference of the issues in an action, upon notice, and before trial, will

Reference on the trial — Hearing cause out of order.

be found fully discussed elsewhere. The motion to refer the cause may also be made on moving the cause for trial in its order on the calendar, or at any time before, without notice, if done in the presence of the adverse attorney. *McCoun v. Rowley*, 19 Wend. 85.

So in a proper case, where the propriety of a reference is disclosed on the trial, the court may, on its own motion, or on the motion of a party, withdraw the cause from a jury and direct a reference.

The cause, in such cases, must be wholly withdrawn, as a cause cannot be tried before a jury in part, and a verdict taken, and partly by a referee afterward to be appointed. *Buchanan v. Cheseborough*, 5 Duer, 238.

c. Hearing cause out of order. Although it is the usual course to hear causes in their order on the calendar, without giving preference to one cause over another, yet they are sometimes heard out of their order and advanced for hearing, on motion, and for good cause shown. Thus where two causes between the same parties, and involving substantially the same points of controversy, are both noticed and on the calendar, but stand at a distance from each other, the court will allow either the last cause to be advanced, or the cause which stands first to be postponed so that both may come on at the same time, on its being shown that it is material that both causes should be heard together.

Under the old chancery practice, in certain cases, a cause might be brought to a hearing on bill and answer without taking any proofs, the answer being considered as true in all points, and the statements of what the defendant expects to prove being considered as proved. See *Brinckerhoff v. Brown*, 7 Johns. Ch. 217.

Under the present practice the same result may be accomplished by interposing a demurrer to the answer. So where the answer is in the nature of a counter-claim, or defense to only a part of the plaintiff's complaint, and admits the residue, the plaintiff may move for judgment for the residue at the hearing, or before that time on notice, by conceding on the motion that the counter-claim or answer is true. Code, § 246. So where the plaintiff has served a reply to a counter-claim which goes only to part of the plaintiff's complaint, leaving the residue unanswered, the plaintiff may waive the reply and move for judgment.

Hearing cause out of order.

ment on such part of the cause of action as remains unanswered, if he chooses to concede the truth of the counter-claim.

So where the defendant has interposed, as a counter-claim, matter which cannot be pleaded as such under the Code, the plaintiff may disregard the counter-claim, and move for and obtain judgment on the complaint. *Van Valen v. Lapham*, 13 How. 240; S. C. affirmed, 5 Duer, 689.

A defendant also may take advantage on the trial of any defect in the complaint or reply, and, on the calling of the cause, move for such judgment as he is entitled to on the pleadings. *Burnham v. De Bevoise*, 8 How. 159; *Budd v. Bingham*, 18 Barb. 494. As every material allegation in the complaint not controverted by the answer, and every material allegation of the counter-claim not controverted by the reply, are taken as true, under section 168 of the Code, these uncontroverted allegations are admissions for the purposes of a motion for judgment on the pleadings, which cannot be contradicted or varied by proof on the trial. See *Hackett v. Richards*, 11 N. Y. Leg. Obs. 315; *Bridge v. Payson*, 5 Sandf. 210. A judgment contrary to such admissions in the pleadings would, if objected to on the trial, be erroneous. *Ib.*

As the material facts set up in a merely defensive answer are, under section 168, to be deemed controverted, the plaintiff will, by moving for judgment on the pleadings, admit the truth of every material allegation therein, and the question will be then presented with the same effect as if raised by demurrer. But although new matter set up in an answer as a defense is sham or irrelevant, the plaintiff cannot move at the trial to strike it out, on the ground that the facts stated do not constitute a valid defense to the action. If the plaintiff omits to demur to an answer or defense, it must, for the purposes of the issue, be deemed sufficient in law, subject to the power of the court to reject evidence, which, if received, could not constitute a defense or counter-claim. *Smith v. Countryman*, 30 N. Y. (3 Tiff.) 655.

A defendant also may, before entering upon the proofs, move for judgment on the pleadings, as, for example, where the answer sets up a counter-claim to which no reply has been served, and where he has not moved for judgment under section 154 of the Code. Or even if a reply to the counter-claim has been served, he may still move for a judgment of dismissal if the complaint shows upon its face that the plaintiff has no title

to relief upon the facts therein stated. Code, § 148; *Burnham v. De Bevoise*, 8 How. 159; *Budd v. Bingham*, 18 Barb. 494; *Bennett v. American Art Union*, 5 Sandf. 614.

This motion should, however, be made before entering upon the proofs; for, if the defendant waits until the plaintiff has closed the evidence to sustain his case, without objecting to the sufficiency of the complaint, the motion will not be regarded with favor; and, if the plaintiff's proof establishes a cause of action, the motion will be denied, and the plaintiff be permitted to amend. *Meyer v. Fiegel*, 7 Rob. 123; S. C., 34 How. 434. See *Smith v. Countryman*, 30 N. Y. (3 Tiff.) 655.

d. Papers for the court. When the issue is brought to trial by the plaintiff, it is his duty to furnish the court with a copy of the summons and pleadings, together with the offer of the defendant, if any has been made. When the issue is brought to trial by the defendant, and the plaintiff neglects or refuses to furnish the court with a copy of the summons and pleadings, and the offer of the defendant, the same may be furnished by the defendant. Code, § 259.

e. Stenographer. In the city of New York a stenographer is employed to report the proceedings of each court. Code, § 256. By the act of 1871, provisions were made for the employment of stenographers in the circuit courts, courts of oyer and terminer and special terms of the supreme court in the sixth, seventh and eighth judicial districts. Laws of 1871, ch. 700. By the act of 1872, the statute above cited was amended so as to include the third, fourth and fifth judicial districts. Laws of 1872, ch. 139. By the act of 1868, similar provisions had been made for the second judicial district, and also for the several county courts therein. Laws of 1868, ch. 765. Stenographers are similarly employed in the several surrogates' courts of this State. Laws of 1871, ch. 874; Code, § 256.

f. Demurrer to evidence. Under the old practice a party might obtain the decision of the court as to whether the facts proved did or did not maintain the issue by demurring to the evidence. The effect of a demurrer to evidence was to admit the facts proved and to deny their sufficiency to maintain the issue. See 1 Hill, 471, note *a*; *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. (6 Smith) 492.

A demurrer to evidence has long since gone out of use in this State, and is no longer to be regarded as a right upon which

an exception can be predicated. *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. (6 Smith) 492. This mode of procedure was not regarded with favor by the earlier courts of this State, and may now be considered obsolete here as it is in England. See *Patrick v. Hallett*, 1 Johns. 241 ; 1 Burr. Pr. 241 ; 1 Archb. Pr. 439.

g. Jurisdiction after cause passed. A judge at circuit has jurisdiction of causes on the calendar after they have been called and passed.

Thus, where a cause is reached at the circuit and called for trial by the defendant, and the plaintiff gives notice of discontinuance and tenders costs, the judge may, at any time after and during the same circuit, upon affidavits showing that the costs have not been paid, make an order dismissing the complaint, with costs, and directing an extra allowance. *Moffatt v. Ford*, 14 Barb. 577.

h. Admissions. No evidence can be received in favor of a party which tends to contradict an admission made by such party in his pleadings. *Crosbie v. Leary*, 6 Bosw. 312. An admission made at or before the submission of a cause cannot subsequently be retracted. *Kohler v. Wright*, 7 Bosw. 318. When counsel agree as to what is admitted in the pleadings the court will not look into them, but will assume an uncontradicted statement of their contents to be true. It will be too late to question the truths of such a statement for the first time on the argument of an appeal. *Munson v. Hagerman*, 5 How. 223 ; S. C., 10 Barb. 112. A party who fails to call attention at the trial to an implied admission in his favor in the pleadings, will not afterward be permitted to avail himself of their benefit, even when overlooked by the court in consequence. *Williams v. Hayes*, 20 N. Y. (6 Smith) 58.

While all the allegations of a complaint not specifically denied are to be regarded as admitted, yet where there are several answers, an admission made in one of them will not be available against the others ; and where one of the answers fails to deny any of the allegations of the complaint, the plaintiff will not be thereby released from the necessity of proving his case. Each answer must stand by itself as a distinct defense, and the plaintiff must recover upon the whole record. *Swift v. Kingsley*, 24 Barb. 541.

Testimony given by a party on a former trial, during which he

was examined as a witness for the adverse party, and which is directly contrary to his testimony in a second suit, may be given in evidence as an admission. *Pickard v. Collins*, 23 Barb. 444.

A demurrer remaining upon the record is an admission of the facts stated in the pleading to which it is interposed, not only for the purposes of the argument, but as evidence upon the trial of the issue to which the pleading demurred to relates. *Cutler v. Wright*, 22 N. Y. (8 Smith) 472. But a demurrer which has been abandoned, like a pleading which has been amended, is no longer a part of the record, and cannot be regarded as an admission of the facts stated in the pleading to which it is interposed. *Brown v. Saratoga R. R. Co.*, 18 N. Y. (4 Smith) 495.

i. General practice at the trial. One of the most important things to be taken into consideration, in preparing for a trial before a jury, is the procuring of the evidence necessary to sustain the action or to establish a defense. It is not only necessary that all witnesses whose testimony is material be duly subpoenaed in advance of the trial, but, also, that they be present at the circuit, and in readiness to take the stand whenever their testimony is needed. It should be one of the first duties of the attorney to see that the evidence upon which he relies to establish his case is at all times available. If the evidence is of a documentary character, he should keep it at all times under his control; and, if it is to be obtained from witnesses, he should take measures to secure their continued attendance until their testimony has been given.

The attorney should also, as far as possible, anticipate the general character of the testimony that will be offered on either side; the objections that may be raised thereto; and the points of law which may be necessary to sustain or defeat such objections. The character of the witnesses themselves must not be overlooked; nor must the possibility of their impeachment be disregarded. The probable demeanor of the witnesses while giving their evidence, the necessity of restraining the over-confident, and of encouraging the timid, although matters that may seem unimportant, are worthy of consideration, as the verdict of the jury is based not only upon the matter to which the witnesses testify, but also upon the manner in which they give their evidence.

The probable or possible prejudice of an individual member of the jury should also be considered, and the means of obtain-

General practice at the trial — *Puis darrein continuance*.

ing his discharge without resorting to the peremptory challenge should be determined by the attorney.

The calling of the jury, the right of challenge, etc., will be considered hereafter.

The cause being in readiness for trial, and the jury impaneled, sworn, and the attorney for the party holding the affirmative of the issues opens the case by reading the pleadings, or stating their substance to the jury, and also the facts and circumstances of the case, the substance of the evidence he is prepared to adduce, and its effect in proving the case stated.

The case being opened, the attorney for the plaintiff proceeds to examine the witnesses in their order. The mode of conducting the examination will be noticed hereafter.

The adverse attorney has the privilege of cross-examining each witness at the close of his direct examination. Either party is entitled to be heard in relation to points of law arising incidentally during the progress of the trial, the one in support of an objection, the other in answer thereto.

The plaintiff, after having made a *prima facie* case, rests, and the defendant is thereupon entitled to open the defense to the jury, and to proceed to examine his witnesses. The defendant, having established the facts on which he relies to defeat the action, or to reduce the amount of the plaintiff's recovery, he will then rest his case and the attorney for the plaintiff may then proceed to call witnesses for the purpose of disproving the defense attempted to be made out by the defendant's witnesses.

The evidence in the case being closed, it is within the discretion of the court to allow either party, afterward, to recall a witness. If no such request is made, or if such request is made and refused, the counsel for the defendant ordinarily sums up the evidence, and the counsel for the plaintiff replies thereto. The judge thereupon delivers his charge to the jury, who then retire to consider their verdict.

The details of the several steps in the trial of the cause, which have thus been briefly outlined, will be given in the subsequent sections, together with the matter incidental thereto.

j. Puis darrein continuance. Under the old practice a defendant, at any time before the jury actually gave their verdict, might plead in abatement or in bar of the action, any matter of defense arising after the service of the answer. This plea was termed *puis darrein continuance*, and, as a general rule, was a

Puis darrein continuance — Contempts.

waiver of the former pleading. If the plea was put in at the circuit, no further proceedings could be had on it there, but it was certified on the back of the record at *nisi prius*, and returned to the court above.

The rules relating to this plea, and to its effect on the subsequent conduct of the cause, are unimportant under the present system of pleadings and practice, except so far as they furnish a guide to the allowance of a supplemental answer, which, under the Code, is a substitute for the plea *puis darrein continuance*. See *Bate v. Fellowes*, 4 Bosw. 638; *Hoyt v. Sheldon*, 4 Abb. 59; S. C., 6 Duer, 661; *Medbury v. Swan*, 46 N. Y. (1 Sick.) 200.

But, while the supplemental answer takes the place of the former plea, *puis darrein continuance*, it is not like that of a waiver of defenses before interposed, and is not confined to matters arising since the last continuance. A plea *puis darrein* could not be rejected or treated as a nullity, because not pleaded in due time, or at the proper time; and could only be set aside upon application to the court; and the court, in its discretion, could permit the plea to stand.

The right to allege new matter, by supplemental pleading, is not, however, an absolute and positive right, but is made to depend upon the leave of the court, in the exercise of a legal discretion. The application may be refused, if the new defense, although strictly legal, is inequitable, or if the application is not made with reasonable diligence. *Medbury v. Swan*, 46 N. Y. (1 Sick.) 200.

The plea, *puis darrein continuance*, could be interposed on the trial and at any time before verdict. A supplemental pleading can be allowed only by the court on motion, and cannot be allowed at the trial. *Lyon v. Isett*, 11 Abb. N. S. 353; S. C., 42 How. 155; *Garner v. Hannah*, 6 Duer, 262.

The decisions above cited are authority for the assertion that the practice relating to the allowance of a plea, *puis darrein continuance*, is unimportant in connection with the practice on a trial under the Code.

k. Contempts. There are two classes of contempts which every court of record has power to punish; and two classes of proceedings for the punishment thereof. These are either proceedings to punish for criminal contempts; or proceedings as for contempts to enforce civil remedies. *Pitt v. Davison*, 37 N. Y.

Contempts.

(10 Tiff.) 235; S. C., 34 How. 355; 3 Abb. N. S. 398; 4 Trans. App. 266.

The subject of contempts will be fully discussed in a subsequent part of this work. It will be sufficient to state in this connection what constitutes a contempt.

The statute declares that every court of record shall have power to punish, as for a criminal contempt, persons guilty of either of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Any breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

3. Willful disobedience of any process or order lawfully issued or made by it.

4. Resistance willfully offered by any person to the lawful order or process of the court.

5. The contumacious and unlawful refusal of any person to be sworn as a witness; and when so sworn, the like refusal to answer any legal and proper interrogatory.

6. The publication of a false or grossly inaccurate report of its proceedings; but no court can punish as a contempt, the publication of true, full and fair reports of any trial, argument, proceedings, or decisions had in such court. 2 R. S. 278 (288), § 10.

Thus it is highly improper for counsel to interrupt the orderly proceedings of a court of justice by instructing a witness not to answer questions. The right to refuse to answer being strictly personal, the interference of counsel to prevent answers from being given, will render him liable to be adjudged guilty of disorderly or contemptuous behavior, directly tending to interrupt the proceedings, or to impair the respect due to the authority of the court; and the court may thereupon issue an attachment and commit him. *Heerdt v. Wetmore*, 2 Rob. 697. See *Taylor v. Wood*, 2 Edw. Ch. 94; *Burnett v. Phalon*, 19 How. 530, 537; 11 Abb. 157, 162.

The authority to punish for such misconduct pertains solely and exclusively to the court in whose immediate view and presence the misconduct occurs. *Ib.*

Section 13. Judgment on the pleadings.

a. In general. The right of either party to an action to demand judgment on the pleadings has been already noticed in the preceding section. It is there stated that the defendant may move for a dismissal of the complaint on the ground that it does not set forth a cause of action, or because there is a counter-claim to which no reply has been served ; and so also it is stated that the plaintiff may move for judgment upon the pleadings, when the answer sets up a defense or counter-claim going only to a part of the plaintiffs demand, or if the answer sets up a counter-claim which is invalid, even, where, if valid, it would off-set the plaintiff's demand.

For the authorities to sustain these propositions see p. 79, *ante*.

Section 14. The jury.

a. In general. The right to a trial by jury, as has been heretofore shown, is a constitutional right of which neither the courts nor the legislature can deprive a party. *Townsend v. Hendricks*, 40 How. 143.

The cases in which the trial of an issue of fact is a matter of strict right it is unnecessary here to consider, as that question is sufficiently discussed elsewhere. *Ante*, 9, 12.

But the right being strictly personal, it may be waived by the consent of the party, who may agree that the cause shall be tried by the court without a jury, or by a referee. See Code, §§ 253, 266.

It also may be waived by the neglect of the party to assert the right in due season. Thus, where an issue is such that a party is entitled, on a proper demand, to have the same tried by jury, a failure to make such demand before the trial is commenced will be deemed a waiver of the right. *McKeon v. See*, 4 Rob. 449 ; *Pennsylvania Coal Co. v. Delaware and Hudson Canal Co.*, 1 Keyes, 72 ; *Barlow v. Scott*, 24 N. Y. (10 Smith) 40 ; *Moffat v. Moffat*, 10 Bosw. 468 ; S. C., 17 Abb. 4.

The mode of obtaining an impartial jury will be pointed out in the subsequent subdivisions of this section.

b. Qualifications of jurors. The Revised Statutes provide that the supervisor, town clerk, and the assessors of the several towns of the State, shall assemble at a time and place designated for the purpose of making a list of persons to serve as jurors.

The said town officers, when so assembled, are required to select from the names of those assessed on the last assessment

Qualifications of jurors.

rolls of the town, suitable persons to serve as jurors. In making such selection they are allowed by the statute to take the names of such only as are, 1. Male inhabitants of the town not exempt from serving on juries; 2. Of the age of twenty-one years or upward, and under sixty years old; who are at the time assessed for personal property belonging to them in their own right to the amount of \$250, or who shall have a freehold estate in real property in the county belonging to them in their own right, or in the right of their wives, to the value of \$150; 4. In the possession of their natural faculties, and not infirm or decrepit; 5. Free from all legal exceptions, of fair character, of approved integrity, of sound judgment, and well informed. 2 R. S. 411 (428), § 13.

Persons residing in either of the counties of Niagara, Erie, Chautauqua, Cattaraugus, Allegany, Genesee, Orleans, Monroe, Livingston, Jefferson, Lewis, St. Lawrence, and Franklin, who do not possess the property qualifications before mentioned, but who are qualified in all other respects, and who have been assessed in the last assessment roll of the town for land in their possession which they hold under contract for purchase, upon which improvements have been made to the value of \$150, and who own such improvements, are qualified to serve as jurors, and may be selected and returned as such by the proper officers. *Id.*, § 14.

A person may be worth \$250 in personal property over and above all debts, and yet not be qualified to serve as a juror if he is not a freeholder and has never been assessed in respect to any personal estate. *Valton v. Nat. Loan Fund Life Ass. Soc.*, 17 Abb. 268. So he may be a freeholder and an inhabitant of the town, and yet not be qualified to serve as a juror, if not a citizen of the United States. *Borst v. Beecker*, 6 Johns. 332; 1 R. S. 721 (669), § 20; *Schumaker v. State*, 5 Wis. 324, 328.

In the city of New York, no person is allowed to serve as a juror unless he is an intelligent man, of sound mind, and good character, free from legal exception, and able to read and write the English language understandingly. But no person is disqualified from serving as a juror by reason of age, unless he is more than seventy years old; nor by reason of non-residence if he has dwelt or lodged in the city or county for the greater part of the time between the first day of October and the thirtieth day of June next thereafter; and to render a person liable to do

Summoning and enforcing attendance.

duty as a juror, it is not necessary that such person shall be assessed or vote in the city. Laws of 1870, ch. 539.

In consideration of certain duties performed for the State, the statutes give to certain persons a right to claim exemption from jury duty. But as this right is a mere personal privilege, and its existence does not disqualify the juror, nor form a ground for challenge, it is unnecessary to do more than to allude to it in this connection. See 2 R. S. 415 (432), § 33. See Laws of 1870, ch. 539.

c. Summoning and enforcing attendance. Duplicate lists of the persons selected to serve as jurors having been made out and duly signed, one copy of the said lists must be transmitted to the county clerk, and the other must be filed with the town clerk. 2 R. S. 412 (429), § 15.

The county clerk at the time specified is required to write out the names of the parties contained in the list with their additions and places of residence, and to deposit them in the form of ballots in a box kept for that purpose. § 16.

Fourteen days before the holding of any circuit court or sittings, or of any special court of oyer and terminer, where no circuit is appointed to be held at the same time, or at any court of common pleas or mayor's court in the city and county of New York, or before the holding of the superior court or the court of general sessions, the clerk of the county in which such court is to be held is required to draw the names of thirty-six persons to serve as petit jurors at such court, and also to draw such number in addition thereto as shall have been ordered according to law. 2 R. S. 413 (430), § 24; Laws of 1861, ch. 215.

Six days' notice of the drawing must be given in the manner prescribed by the statute. § 25. The sheriff and county judge should be present at the drawing; or in their absence, and after the prescribed proceedings have been had to require their attendance, the clerk may proceed to draw the jurors in the presence of the other officers specified in the statute. See 2 R. S. 414 (431), § 28.

The mode of drawing is as follows: The clerk, after shaking the box containing the names of the jurors, draws out as many slips containing such names as there are jurors required, and each name as drawn is entered in the minutes of the drawing kept by one of the attending officers. After drawing the required number of names, if any of the persons whose names have been

Summoning and enforcing attendance.

drawn are known to be dead, insane or removed from the county, the slips containing their names are destroyed and others drawn instead, until the required number of jurors has been drawn. The minute of the drawing is then signed by the clerk and the attending officers, and filed in the clerk's office. A list of the names of the persons so drawn, with their additions and places of residence, and specifying for what court they were drawn, is then made and certified by the clerk and attending officers and delivered to the sheriff of the county. § 29.

The sheriff is required to summon the persons named in the list to attend the court, and this must be done at least six days previous to the sitting thereof by giving personal notice to each person, or by leaving a written notice at his place of residence with some person of proper age. The sheriff is also required to return the list to the court at the opening thereof, specifying who were summoned and the manner in which each person was notified. § 30.

The court may impose a fine not exceeding \$25 for each day that any person duly summoned as a juror shall, without reasonable cause, neglect to attend. But, if it appears, by the sheriff's return, that any person was notified by leaving a written notice at his place of residence, the court is required to suspend the fine until the defaulting juror has been notified as provided by law. 2 R. S. 415 (432), § 32. Every court of record of the city of New York has power to cause any person who has omitted to appear and answer any summons to attend as a juror to be arrested and brought before the court, if the summons before mentioned was personally served; and, if such person is liable to serve as a juror, may punish him by fine or imprisonment. Laws of 1870, ch. 539, § 15. The fine imposed cannot be less than \$50, nor more than \$250; but if it appears by the return that the juror was not personally served with the summons, he must be notified to show cause why the fine should not be imposed in the manner provided by the act. § 18. The act cited also makes it the duty of every court to impose a fine in every case in which a person duly summoned as a juror shall not appear, and provides for the arrest and imprisonment of the juror for default in payment, unless the fine shall be remitted as provided therein.

The county judge of any of the counties of this State is authorized, at the time of drawing grand and petit jurors, to attend any

Additional jurors — Alien jury.

county court or court of sessions to be held in their respective counties, to designate any day during said term that he may deem expedient, on which the petit jurors shall be required to attend for the trial of issues of fact; and it is the duty of the sheriff of the county to summon such petit jurors to attend such court on the day designated by the county judge. Laws of 1861, ch. 8.

d. Additional jurors. Whenever any circuit court, or court of oyer and terminer, shall be satisfied that the public interest requires the attendance at such court, or at any adjourned term thereof, of a greater number of petit jurors than is now required to be drawn and summoned for such court, then said court may, by order entered in its minutes, require the clerk of the county to draw, and the sheriff to summon, such additional number of petit jurors as it shall deem necessary, which number shall be specified in said order.

The clerk of the county in which such court is held shall forthwith bring into court the box containing the names of the petit jurors, from which jurors from said county are required to be drawn, and the clerk shall, in the presence of the court, proceed publicly to draw the number of jurors specified in the order, and, when such drawing is complete, make two lists of the persons so drawn, each of which shall be certified by him to be a correct list of the names of the persons so drawn by him, one of which he shall file in his office, and the other he shall deliver to the sheriff.

The sheriff shall thereupon immediately proceed to summon the persons mentioned in such list to appear in the court in which the order requiring the attendance of such jurors shall have been made on the day designated in such order, and the persons so summoned shall appear, in obedience to such summons, and all the provisions of law relating to the swearing in of jurors, and their punishment for non-attendance, not inconsistent with this act, shall apply to the swearing in, summoning and punishment of the jurors drawn and summoned under this act. Laws of 1871, ch. 16.

e. Alien jury. Trials of issues of fact, by jury, in every court of common-law jurisdiction, must be had by jurors, drawn, summoned and returned, as prescribed by statute; and no alien is, under existing laws, entitled to a jury of part aliens or strangers in any suit whatever. 2 R. S. 419 (437), § 53.

Fees of jurors.

f. Fees of jurors. The Revised Statutes allow, as fees to each juror impaneled to try a cause in any circuit court or court of common pleas, twenty-five cents for each cause in which he is impaneled, to be paid by the party noticing the cause for trial, or, if noticed by both parties, to be paid by such party as the court shall direct. 2 R. S. 643 (662), § 37.

In addition to these fees, the boards of supervisors of the respective counties of the State may, at their annual meeting, direct a sum, not exceeding \$2 per day, to every grand or petit juror for attending the courts of record held within the county.

This allowance may be made to grand jurors only, or to petit jurors only; and the supervisors may also direct an allowance to be made to such jurors for travelling, in coming to and returning from such courts, but not to exceed five cents per mile.

Any sums so allowed to jurors are made by the statute a county charge, and are paid to the jurors by the county treasurer, on the production of a certificate of the clerk of the court at which they have attended, specifying the time each juror has actually attended, and the distance traveled by him. 2 R. S. 643 (662), § 37; Laws of 1866, ch. 307.

Each juror sworn in any action in a mayor's court is entitled to a fee of twenty-five cents; and each juror sworn before any officer in any special proceeding allowed by law, or before any sheriff upon any writ of inquiry, or to try any claim to personal property, is entitled to a fee of twelve and a-half cents. *Ib.*

The fees of jurors in the city and county of New York are regulated by special statute. In that city, no person can serve as a juror in courts of record at more than two terms in any jury year. While attending as jurors they are entitled to receive for each day of actual attendance and service in the court of general sessions of the peace, or in the court of oyer and terminer, the sum of \$2 to be paid to him by the county treasurer upon a certificate by the clerk of his attendance and service, and an order of the court for his payment; and in other courts of record each juror is entitled to receive for each case in which he shall be impaneled, \$1 if the case be tried, and fifty cents if default be made, such fee to be paid by the clerk of the court, and to be collected by him, by requiring the payment of fifty cents before the case is placed on the calendar, and if there be a trial, fifty cents before the verdict shall be entered. Laws of 1870, ch. 539.

Calling and swearing jury.

g. Calling and swearing jury. The Revised Statutes provide that, at the opening of every court at which issues of fact are to be tried, the clerk of the court shall cause the names of the several persons returned as jurors by the sheriff, with their respective additions and places of residence, to be written on several and distinct pieces of paper; and shall roll up or fold such pieces of paper, each in the same manner, as near as may be, and so as to resemble each other as much as possible, and so that the name written thereon shall not be visible. These papers must be deposited in a proper box. 2 R. S. 420 (438), § 59.

When any issue is brought on for trial, the clerk, under the direction of the court, openly draws out of the box, one by one, so many of the ballots containing the names of the jurors returned, as will be sufficient to form a jury. 2 R. S. 420 (438), § 60. But before the jury is drawn, the box containing the names of the jurors must be closed, and be well shaken, so as to intermingle the ballots, and the clerk must then draw the ballots from the box through a hole in the lid, and without seeing the names written on such ballots. 2 R. S. 421 (439), § 66.

The first twelve persons who shall appear as their names are drawn and called, and shall be approved as indifferent between the parties, shall be sworn, and shall be the jury to try the issue. 2 R. S. 420 (438), § 61.

The ballots containing the names of the jurors so sworn must then be deposited in another box and there kept apart from the ballots containing the names of the other jurors until such jury be discharged. 2 R. S. 420 (438), § 62.

After such jury have been discharged the ballots containing their names must be again rolled up or folded, and returned to the box from which they were first taken. The same course must be pursued as often as any issue shall be brought on to be tried. 2 R. S. 420 (438), § 63.

If any juror is absent at the time his name is drawn and called, or is set aside, or excused from serving on the trial of any issue, the ballot containing his name must be rolled or folded again, in the same manner as before, and returned to the box containing the undrawn ballots, as soon as a jury is sworn to try the issue. 2 R. S. 421 (439), § 67.

When the court has discharged any juror, by reason of his exemption from jury duty, it is the duty of the clerk to destroy the ballot containing the juror's name. 2 R. S. 415 (433), § 34.

The court is required to discharge any person from serving on a jury, in the following cases :

1. When it shall satisfactorily appear that such person is not at the time the owner in his own right, or in the right of his wife, of a freehold estate in real property, situated within the county, of the value of \$150, and is not the owner of personal property to the value of \$250 ; or, if the person is a resident of either of the counties of Niagara, Erie, Chautauqua, Cattaraugus, Allegany, Genesee, Orleans, Monroe, Livingston, Jefferson, Lewis, St. Lawrence or Franklin, where it shall appear that he has not land in his possession which he holds under contract for purchase, upon which improvements owned by him have been made to the value of \$150.

2. When it shall appear that such person is under twenty-one years of age, or over sixty years of age, or that he is not in the possession of any of his rational faculties.

3. When there is any legal exception against such person.

4. When such person is a non-commissioned officer, musician, or private of any uniformed company or troop, and is duly equipped and uniformed, according to law, and shall claim such exemption. The evidence of such exemption shall be the certificate of the commanding officer of the company or troop, that the person claiming the same is a member of such company, and is duly equipped and uniformed according to law. Such certificate must be dated within three months of the time of presenting the same, and the signature must be verified by oath. Every such certificate must be filed with the clerk of the court to which it is offered.

5. When such person is a member of any company of firemen duly organized according to law.

6. When such person is in the actual employment of any glass, cotton, linen, woolen or iron manufacturing company by the year, month or season.

7. When such person is a superintendent, engineer or collector of any canal authorized by the laws of this State, any portion of which shall be actually constructed and navigated.

8. When such person is a minister of the gospel, or teacher in any college or academy, or when such person is or shall be exempted by law from serving on juries. 2 R. S. 415 (432), § 33.

Every commissioned officer, and every non-commissioned officer, musician and private of the National Guard shall be exempt

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from jury duty ; and every such person who shall have served seven years, and been honorably discharged, shall forever after be exempt from jury duty. Laws of 1870, ch. 80, § 253.

Every general and staff officer, every field officer, and every commissioned and non-commissioned officer, musician and private of the military forces of this State who enlisted or accepted office during any of the time from April 17, 1854, to April 29, 1865, and was or may be honorably discharged after serving for seven years, shall forever after, so long as he remains a citizen of this State, be exempt from jury duty. Laws of 1871, ch. 245.

The operators, assistant operators, clerks and other persons in the employ of the different telegraph companies in the State of New York, and while doing duty in the offices of said companies, or along the routes of their telegraph lines, shall be exempt from militia duties and serving on juries, and from any fine or penalty for neglect thereof. Laws of 1861, ch. 215.

In the city of New York no person is exempt from serving as a juror by reason of age, unless he is more than seventy years old ; and a dwelling or lodging by any person in the city and county of New York for the greater part of the time between the first day of October and the thirtieth day of June next thereafter, is a sufficient residence to render such person liable to do duty as a juror ; and it is not necessary that such person be assessed or vote in that city. Laws of 1870, ch. 539, § 4.

The laws relating to the exemption of jurors in the city of New York are as follows :

The commissioners of jurors shall exempt from serving as jurors the following persons :

1. Every person who is not, at the time of application, the owner in his own right, or in the right of his wife, of real or personal estate of the value of \$250.
2. Ministers of the gospel, professors and teachers in colleges, academies, or public schools, practicing physicians and surgeon dentists having patients requiring their daily professional attention, and attorneys and counselors of the supreme court of this State in actual practice at the bar thereof, provided that any such person is not engaged in any other business.
3. Every person holding office under the United States, or the State, city or county of New York, whose duties at the time shall prevent his attendance as a juror.
4. All persons actually engaged in business as pilots or engi-

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neers ; all captains and other officers of steam or sailing vessels ; all consuls of foreign nations ; all telegraphic operators.

5. The grand jurors for the year, selected pursuant to law.

6. Every person who shall have well and truly served in any legally organized fire department or company in this State, for the period prescribed by law to entitle him to exemption.

7. Every officer, non-commissioned officer, musician and private actually serving in any brigade, regiment, battalion, company or troop of the New York State militia uniformed and equipped according to law, and faithfully performing all the duties of a soldier therein by making the parades, and attending the drills, inspections and reviews required by law, or who shall have done so for the period heretofore prescribed by the laws of this State to entitle him to such exemption, and the evidence of such right to exemption from jury duty shall be the certificate of the commanding officer of the regiment, brigade, battalion, company or troop to which the applicant belongs, bearing date, when relating to services not already completed, within three months of the time of its presentation and duly verified by the oath or affirmation of the person applying for such exemption, which certificate shall be filed with the commissioners of jurors.

8. All persons who shall be physically incapable of performing jury duty, by reason of severe sickness, deafness or other physical disorder. The evidence required for either the permanent or temporary exemption of any such person shall be the certificate of a reliable physician together with the oath or affirmation of the person claiming exemption, or such other evidence as the commissioner may deem necessary. Laws of 1870, ch. 539, § 6, as amended by Laws of 1872, ch. 535.

The Revised Statutes provide that the court to which any person shall be returned as a juror shall excuse such juror from serving at such court, whenever it shall appear :

1. That he is a practicing physician, and has patients requiring his attention ; or

2. That he is a surrogate, or justice of the peace, or executes any other civil office, the duties of which are, at the time, inconsistent with his attendance as a juror.

3. That he is a teacher in any school, actually employed and serving as such.

4. When, for any other reason, the interests of the public or of the individual juror, will be materially injured by such

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attendance ; or his own health or that of any member of his family requires his absence from such court. 2 R. S. 416 (433), § 35.

h. Talesmen. Whenever a sufficient number of jurors, duly drawn and summoned, do not appear, or cannot be obtained, to form a jury, the court may order the sheriff to summon from the by-standers, or from the county at large, so many persons qualified to serve as jurors, as shall be sufficient. 2 R. S. 420 (437), § 54.

The sheriff shall summon the number so ordered from among the inhabitants of the county duly qualified to serve as jurors in the cause, and return their names to the court. Every person so summoned shall attend forthwith and serve as a juror, unless excused by the court ; and for any neglect or refusal to so attend, shall be subject to fine in the same manner as jurors regularly drawn and summoned, as hereinbefore provided ; and the persons so summoned shall be subject to all exceptions and challenges as other jurors. 2 R. S. 420 (437), § 55.

In addition to these provisions of the Revised Statutes, it has been further enacted, that the clerk of every county, in addition to the box by law now provided and kept for the purpose of containing the names of jurors drawn to serve at any court, shall provide another box in which he shall deposit the names of all persons who have been selected and returned as suitable persons to serve as jurors, and who reside in the city or town where courts are appointed by law to be held.

Whenever a sufficient number of jurors duly drawn and summoned do not appear, or cannot be obtained to form a jury, the court may order the sheriff to draw in the presence of the court, from the box so kept by the clerk of the county, and containing the names of persons returned to serve on petit juries, for the city or town where such court is held, the names of so many persons as shall be sufficient and as the court may direct. The court may also, by the consent of the parties to any action pending therein, order the sheriff to summon from the by-standers, or from the county at large, so many persons qualified to serve as jurors, as shall be necessary to make the full panel of jurors on the trial of such action.

The sheriff shall forthwith summons the persons so drawn and make return thereof in the same manner as now provided by law in cases where persons are summoned as jurors from the by-

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standers, and the persons so summoned shall attend forthwith and serve as jurors unless excused by the court, and shall be subject to the same penalties for neglect or refusal to attend. This act does not apply to the city and county of New York, nor to the county of Kings. Laws of 1861, ch. 210.

The act above given does not repeal or in any wise affect sections 54 and 55 of article 4, title 4, chapter 7, part 3 of the Revised Statutes. Laws of 1867, ch. 494.

The power of the court to require an additional number of jurors to be drawn and summoned, whenever in the opinion of the court an additional number may be necessary, has already been referred to. See *Additional Jurors*, *ante*, p. 93. See also Laws of 1870, ch. 409, as amended by Laws of 1871, ch. 16.

i. Special jury. The Revised Statutes provide that when it shall appear to the supreme court, or to any county court, or the superior court of the city of New York, or to the superior court of Buffalo, in which any cause shall be pending, that a fair and impartial trial cannot be had without a struck jury, or that the importance or intricacy of the cause requires such a jury, such court shall order a special jury to be struck for the trial of such cause. 2 R. S. 418 (435), § 46, as amended by Laws of 1857, ch. 530.

An application for a struck or special jury is not regarded with favor by the courts, and will be granted only in extreme cases. *People v. McGuire*, 43 How. 67; *Walsh v. Sun Mutual Ins. Co.*, 2 Rob. 646; S. C., 17 Abb. 356; *Nesmith v. Atlantic Ins. Co.*, 8 id. 423; *Patchin v. Sands*, 10 Wend. 570. The mere fact that the government of the United States is interested in a cause does not make it of sufficient importance to grant a struck jury. The parties litigant do not make a case important. *Hartshorn v. Gelston*, 3 Cai. 84. Neither will the fact that the controversy has a local interest be, of itself, a sufficient ground for ordering a struck jury.

Thus, where an action in the nature of a *quo warranto* was brought to try the title to the office of justice of the district court of the city and county of New York for the seventh judicial district, the application for a struck jury was denied. *People v. McGuire*, 43 How. 67. So where an action grew out of a long agitated controversy between the public officers of Brooklyn and the plaintiff, relative to a contemplated improvement in the opening of a street, the motion for a struck jury was denied, although

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the affidavit on which the motion was based alleged the belief of the plaintiff that there would not be a fair and impartial trial of the cause by jurors of the county where the action was necessarily triable. *Patchin v. Sands*, 10 Wend. 570.

So the mere fact that there have been previous trials of the same action by jurors drawn in the ordinary manner, and that the final disposition of the cause has been upon each occasion deferred through the misbehavior or disagreement of the jury, will not be a sufficient ground for ordering a special or struck jury. *Nesmith v. Atlantic Ins. Co.*, 8 Abb. 423.

But, although cases seldom arise in which a struck jury may be properly ordered, the statutes relating to special juries are still in force, and the rules of practice relating to the proceedings to obtain such jury are far from obsolete.

When a struck jury is ordered, the party obtaining the order must give eight days' notice of the time when he will attend before the clerk of the county in which the venue in such action is laid, for the purpose of having such jury struck. At the time appointed the clerk of the county is required to attend at his office, with the original list of the jurors returned to him by the officers of the several towns, who are then liable to serve, and in the presence of the parties or their counsel, proceed to strike a jury.

The mode of proceeding is as follows :

The clerk selects from the list the names of forty-eight persons whom he deems most indifferent between the parties, and best qualified to try the cause. The party on whose application the jury was ordered is then entitled to strike out one of the names so selected, and the opposite party or his agent is then entitled to strike out another, and so alternately until each party has struck out twelve names. If either party fails to attend at the time and place of striking such jurors, or neglects to strike out any names as above provided, the clerk must strike for him. The clerk thereupon makes out a list of the names of the twenty-four persons not stricken out, and certifies the same to be the persons drawn to serve as jurors pursuant to the order of the court, and delivers the list so certified to the sheriff of the county. 2 R. S. 418 (435), §§ 47, 48.

The sheriff is required to summon the persons named in the list in the same manner as other jurors are summoned, and to

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return the names of those summoned to the court at which they are required to appear as jurors. 2 R. S. 418 (436), § 49.

The jury selected for the trial of the cause is formed from the persons so summoned, and appearing in the same manner as other juries are formed; and the court has the same power to excuse or discharge any such juror, as in other cases. 2 R. S. 418 (436), § 50.

If it appears to the court, upon an application for a struck jury, that the clerk of the county is interested in the cause, related to either party, or not indifferent between them, the court must appoint two proper persons to strike the jury, if an order is made allowing a special jury. The persons so appointed will possess all the powers of the clerk in relation to the striking, certifying and delivering to the sheriff the names of the persons struck as jurors, and the sheriff is required in like manner to summon the persons so selected. 2 R. S. 418 (436), § 51.

The expense of striking a jury must be paid by the party applying for the order, and cannot be taxed in the costs of the suit. 2 R. S. 418 (436), § 52.

j. Foreign jury. Under the old practice, it was customary in cases of general interest, where an impartial trial could not be had in the county where the venue was laid, to apply for an order directing a foreign jury drawn from a neighboring county. If it was clear that an impartial trial could not be had by a jury drawn from the county, the order was granted. *Stryker v. Turnbull*, 3 Cai. 103.

It seldom happened, even under the old practice, that an order directing the trial of a cause by a foreign jury was deemed necessary. See *Patchin v. Sands*, 10 Wend. 570.

And under the Code an order directing a foreign jury to be summoned is even less necessary, as the Code allows the court or the parties to change the place of trial when there is reason to believe that an impartial trial cannot be had therein. See Code, § 126.

The practice as to foreign juries is now practically obsolete.

Section 14. Challenges.

a. In general. It frequently happens that some of the jurors summoned to try a cause are not qualified to decide the issues. Although all the jurors may possess the requisite legal qualifications, there may be valid reasons why some of them should not serve as jurors in the particular case then to be tried. A

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juror may have certain fixed opinions that would render him unable to render an impartial verdict in certain classes of cases; or the officer who summoned the jury may have been so prejudiced against a party to the action as to render it unsafe to proceed to trial with the jury summoned by him. For these and similar reasons the law has given to the parties the right of challenge.

Challenges belong to one of two classes, viz.: Challenges to the array, or to the polls. In either case the challenges cannot be made until the jury box is full. *King v. Edmonds*, 4 Barn. & Ald. 471; *Brunskill v. Giles*, 9 Bing. 13.

b. Challenge to the array. Upon the appearance of a full jury, either party may interpose objections to all the jurors collectively, on account of some alleged partiality or misconduct on the part of the officer who summoned them, or on the part of the clerk. A challenge of this nature is termed a challenge to the array.

Challenges to the array are almost obsolete in civil actions, as it rarely occurs that such challenges are necessary.

It is not a cause of challenge to any panel or array of jurors in any cause, that the clerk of the county who drew them was a party, or interested in the cause, or was counsel or attorney for either party, or related to him. 2 R. S. 420 (437), § 56; *Wakeman v. Sprague*, 7 Cow. 720.

But a challenge lies to the array, for any partiality or default in the clerk in selecting and arraying a jury. *Gardner v. Turner*, 9 Johns. 260; *Wakeman v. Sprague*, 7 Cow. 720; *Pringle v. Huse*, 1 id. 432.

Thus, where the clerk drew out of the box containing the names of jurors, seventy-two names instead of thirty-six, and then selected thirty-six of those so drawn to be summoned by the sheriff, this was held a sufficient ground for a challenge to the array. *Gardner v. Turner*, 9 Johns. 260.

Formerly, if a sheriff who was a party in a cause served the *venire*, it was a good ground of challenge to the array. *Woods v. Rowan*, 5 Johns. 133. But it is now provided by statute that it shall not be a good cause of challenge to the panel or to the array of jurors in any cause, that they were summoned by the sheriff who was a party, or interested in such cause, or related to either party therein, unless it be alleged in such challenge and be satisfactorily shown, that some of the jurors drawn by the

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clerk were not summoned, and that such omission was intentional. 2 R. S. 420 (437), § 57.

In penal actions for the recovery of any sum, it is not a good cause of challenge to the jurors summoned, or to any officer summoning them, that such juror or officer is liable to pay taxes in any town or county which may be benefited by such recovery. 2 R. S. 420 (437), § 58.

c. Challenge to the polls. A challenge to the polls is an exception individually, to one or more of the jurors who have appeared.

Challenges to the polls may be classified under the following heads: 1. Challenge *propter defectum*, or challenge for disqualification; 2. Challenge *propter affectum*, or challenge to the favor; 3. Challenge *propter delictum*, or a challenge for crime.

d. Challenge for disqualification. A challenge for disqualification is proper where the juror who has been summoned does not possess the qualifications which the law declares every juror shall possess. Thus a challenge for disqualification is proper where the juror has not sufficient freehold or other property, or is within the age of twenty-one years, or above the age of sixty, or is an idiot or lunatic, or an alien, or a non-resident of the county. Any want of the qualifications required by law is a ground for this challenge.

But a matter which merely exempts a person from serving on a jury, but does not incapacitate him, can never be a cause of challenge.

e. Challenge for crime. A challenge for crime is proper when for some act of the juror he has ceased to be in consideration of law a good and true man. Thus, when a party summoned as a juror has been convicted of an infamous crime, such as perjury, forgery, or the like, he may be challenged, and on proof of the fact, will be set aside. Co. Litt. 158.

f. Challenge to the favor. It is a general rule of law that a juror must be indifferent between the parties, and if it appears probable that he is not indifferent, this may be made the subject of challenge, either principal or to the favor, according to the degree of probability of his being biased. *People v. Bodine*, 1 Denio, 281. A principal cause of challenge to a juror carries with it *prima facie*, evident marks of suspicion, either of malice or favor, and is sufficient of itself to exclude the juror, without leaving any thing to the conscience or dis-

Challenge to the favor.

cretion of triers or of the court. The challenge to the polls for favor is of the same nature with the principal challenge *propter affectum*, but of an inferior degree. The cause of challenge to the favor may not, in the judgment of law, imply a disqualifying bias, but if the triers, upon hearing the evidence, find that the juror challenged is not altogether indifferent, it is their duty to reject him, for it is a rule of law, that the juror must stand indifferent as he stands unsworn. *People v. Bodine*, 1 Denio, 281; Co. Litt. 157, *b*. A challenge for principal cause presents a question of law, while a challenge to the favor presents a question of fact. The effect of these two species of challenges is the same; the only difference between them is the mode of trying them. Co. Litt. 158; 1 Cow. 439, note.

The causes of challenge to the favor, according to Lord Coke, "are infinite." Co. Litt. 157, *b*. The grounds of challenge for principal cause being such as raise a legal presumption of bias must, on the other hand, be limited. Actions pending between the juror and the party challenging, which imply malice, ill-will, or revenge, as slander, assault and battery, or the like, are causes of principal challenge; while all other actions between the juror and the party challenging are but to the favor. *People v. Bodine*, 1 Denio, 281; 1 Co. Litt. 157, *b*.

Some of the grounds of principal challenge for bias are as follows: 1. That the juror is of kin to either party within the ninth degree (1 Denio, 438, note); or within any degree whatever. Co. Litt. 157. 2. That there is an affinity or alliance by marriage between the juror and one of the parties, and that the affinity continues, or that issue of the marriage is still living; Co. Litt. 157. 3. That the juror has an interest in the action direct or collateral. *Wood v. Stoddard*, 2 Johns. 194; *Commonwealth v. Ryan*, 5 Mass. 90; *Hesketh v. Braddock*, 3 Burr. 1847. 4. That the juror is interested in an action depending upon the same principles or evidence. 1 Denio, 438, note. 5. That the juror is the tenant of either party. *Hathaway v. Helmer*, 25 Barb. 29; Co. Litt. 157. 6. Or that he is in the employment of either party. Co. Litt. 157. 7. That he has formed or expressed an absolute, unconditional, definite and settled opinion in relation to the merits of the action. *People v. Rathbun*, 21 Wend. 509; *People v. Bodine*, 1 Denio, 281; *People v. Mallon*, 3 Lans. 224; *Lowenberg v. People*, 27 N. Y. (13 Smith)

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336 ; *Freeman v. People*, 4 Denio, 9 ; *People v. Honeyman*, 3 id. 121 ; *Durell v. Mosher*, 8 Johns. 445 ; *Cancemi v. People*, 16 N. Y. (2 Smith) 501.. 8. That the juror has given a verdict before for the same cause ; or that he has given a verdict upon the same title or matter, though between other parties. Co. Litt. 157.

While a direct or collateral interest in the result of the action is a good cause for principal challenge for bias, a remote interest, such as is common to every tax payer of a town or county, may not be a cause of challenge.

Thus, the statutes provide, that in penal actions for the recovery of any sum, it shall not be a good cause of challenge to the jurors summoned, or to the officer summoning them, that such juror or officer is liable to pay taxes in any town or county which may be benefited by such recovery. 2 R. S. 420 (437), § 58. So an opinion as to the merits of the cause, if purely hypothetical, depending upon the truth or falsity of mere rumors or reports, or of accounts in newspapers, is not such an opinion as will disqualify a juror for principal cause. *People v. Mallon*, 3 Lans. 224 ; *Durell v. Mosher*, 8 Johns. 445 ; *Ex parte Vermilyea*, 6 Cow. 555. The rule is otherwise where the juror has formed his opinion, not from a mere loose rumor but from information derived from the party himself, or from those necessarily acquainted with the facts. *Rogers v. Rogers*, 14 Wend. 131 ; *Ex parte Vermilyea*, 6 Cow. 555. A mere impression which does not amount to an opinion is not a ground for principal challenge. *People v. Sanchez*, 18 How. 72 ; S. C., 4 Park. Cr. 535. But an absolute decided opinion, once formed, is a ground for principal challenge for bias, although the juror may testify that his belief may be changed by evidence. *Cancemi v. People*, 16 N. Y. (2 Smith) 501.

The following are among the grounds of challenge to the favor :

That a party to the suit is a tenant of the juror. *People v. Bodine*, 1 Denio, 306 ; *Hathaway v. Helmer*, 25 Barb. 29. That the juror is indebted to the party. *People v. Bodine*, 1 Denio, 281. That the juror may become the debtor of the party, as where he has indorsed a note payable to one of the parties. *Mechanics and Farmers' Bank v. Smith*, 19 Johns. 115. That the juror is a stockholder in a bank where the bank is a party to the action. *Milligan's Case*, 6 C. H. Rec. 69. But see

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Purple v. Horton, 13 Wend. 9 (22). That the juror is a fellow-servant with a party to the suit. *People v. Bodine*, 1 Denio, 281; Co. Litt. 157, *b*. That the juror is a member of the same society or club as one of the parties. *Purple v. Horton*, 13 Wend. 9. That the juror is intimate with either party or has had a dispute with either party. Co. Litt. 157; *Anonymous*, 3 Salk. 81. That the juror has formed or expressed a hypothetical opinion respecting the subject of the controversy. *People v. Mallon*, 3 Lans. 224; *People v. Bodine*, 1 Denio, 281; *Stout v. People*, 4 Park. Cr. 71; *Freeman v. People*, 4 Denio, 9; *People v. Honeyman*, 3 id. 121; *People v. Bodine*, 1 id. 281.

The illustrations above given are among the more common objections that may be raised to the competency of a particular juror in ordinary civil actions. It must be remembered, however, that the causes of challenge to the favor are infinite, and are, in all cases, matters of fact to be determined by the triors.

g. Mode of challenging. A challenge to the array or to the polls cannot be made before a full jury have appeared, and any challenge previously made will be irregular. *King v. Edmonds*, 4 Barn. & Ald. 471. It is immaterial which party makes the first challenge, but the party who begins must finish all his challenges before the other begins, or he will be precluded from making further challenges. 1 Cow. 439, *note*. See Co. Litt. 158, *a*.

The challenge to the array must be in writing, but a challenge to the polls may be made orally. 1 Cow. 439, 441, *note*. In either case the ground of the challenge should be distinctly stated, otherwise the challenge is incomplete, and may be wholly disregarded by the court. It is not enough to state that the challenge is for principal cause, or for favor, merely. The cause of the challenge must be specified. *Freeman v. People*, 4 Denio, 9, 31; *People v. Mallon*, 3 Lans. 224. The rule is the same whether the challenge is in writing or by parol. *Mann v. Glover*, 2 Green, 195. The challenge must be in such terms that the court can see, first, whether it is for principal cause or to the favor, and so determine by what forum it is to be tried; and, secondly, whether the facts, if true, are sufficient to support such a challenge. Thus, if the challenging party does not deem the juror indifferent, he must state some facts or circumstances which, if true, will show either that the juror is positively and legally disqualified, or create a probability or suspicion that he

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is not, or may not be, impartial. In the former case the challenge would be a principal one, triable by the court; in the latter, it would be to the favor and submitted to triers. *Mann v. Glover*, 2 Green, 195; *People v. Mallon*, 3 Lans. 224.

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And now, at this day, to wit (*stating time and place*), came as well the aforesaid plaintiff, as the aforesaid defendant, by their respective attorneys aforesaid, and the jurors of the jury impaneled in this cause being summoned, also came and hereupon the said (*defendant*) challenges the array of the said panel; because he says that (*here set forth the matter of challenge with certainty and precision*), and this he is ready to verify. Wherefore he prays judgment, and that the said panel may be quashed.

G. H.,

Attorney for Defendant.

h. Trial of challenge. An important change has been made by statute in relation to the mode of trying challenges. And in discussing the matter, the common-law rule will first be stated, and then the statute provision will be given. Challenges to the array are of two kinds: either principal or to the favor. The former must be tried by the court, and the latter by triers. *Vanauken v. Beemer*, 1 South. 364; Co. Litt. 156, 158.

If the facts alleged in the challenge are denied, the court proceeds to appoint two triers out of the panel, or perhaps any two persons not impaneled. *Gardner v. Turner*, 9 Johns. 260; Co. Litt. 158. If the triers pronounce the causes of challenge unfounded, the trial proceeds. If the facts are admitted, but are deemed insufficient, the court adjudges on them, and either quashes the array, or overrules the challenge. *Ib.*

If the array be quashed as to the sheriff, a new venire must be awarded to the coroner; if quashed as to the coroner, then the venire is awarded to persons appointed by the court for that particular purpose, termed *elisors*, to whose array no challenge is allowed. Co. Litt. 158. If the array is not quashed the party may then make his challenges to the polls. *Hesketh v. Brad-dock*, 3 Burr. 1847; 1 Cow. 441, *note*.

All challenges to the polls are either for principal cause or for favor. If the challenge is for disqualification or for crime, the challenge is for principal cause. But where the challenge is for bias, it may be for principal cause, or to the favor. As a general

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rule, a principal challenge to the polls is triable by the court, while a challenge to the favor is triable by triors. The rule is founded upon the principle that the principal challenge presents a question of law, while a challenge to the favor presents only a question of fact. If the challenge is for principal cause, and the facts on which the challenge rests are admitted, the question raised is purely a question of law, and the court has only to pronounce the effect of such facts; but if the facts are disputed it is the proper course to submit them to triors. *People v. Mather*, 4 Wend. 229; *Ex parte Vermilyea*, 6 Cow. 555. But in all cases a challenge for principal cause may be tried by the court, unless one of the parties demand that it be tried by triors; and when so tried by the court the decision is subject to the same rules in all respects as if made by triors. *Ex parte Vermilyea*, 6 Cow. 555; *People v. Mallon*, 3 Lans. 224. See *Sanchez v. The People*, 22 N. Y. (8 Smith) 147.

A challenge to the favor may be tried by the court with the consent of counsel; and when the court acts as a trior upon a challenge to the favor, it will be assumed that he so acted by consent of the parties in the absence of all objections, or of a request to submit the question to triors. If the parties desire that the question of favor should be tried by triors, an objection should be made to its trial by the court at the time the challenge is made. *O'Brien v. People*, 36 N. Y. (9 Tiff.) 276; S. C., 3 Abb. N. S. 368; 2 Trans. App. 5; *People v. Mallon*, 3 Lans. 224; *People v. Mather*, 4 Wend. 229; *People v. Rathbun*, 21 id. 509 (542); *Stout v. People*, 4 Park. Cr. 132. But in the absence of an express or implied consent to a trial of a question of favor by the court, the challenge to the favor must be determined by triors. *Stout v. People*, 4 Park. Cr. 132.

These triors, in case the first man called be challenged, are two indifferent persons named by the court; and if they try the juror and find him indifferent, he is sworn; and he, with the two jurors, try the next; and when another is found indifferent and sworn, the triors are superseded and the two thus first sworn on the jury try the rest. If, on the other hand, the two jurors first called take the box without challenge, they must try the rest. 1 Bla. Com. 363; Co. Litt. 158; *McCormick v. Brookfield*, 1 South. 69. The course of procedure here marked out, and this only, can be pursued. More than two triors, or more than two jurors, can in no case be sworn to try a challenge to a juror;

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but in the particular case mentioned, one juror with the two triors may be sworn for this purpose. *McCormick v. Brookfield*, 1 South. 69.

Before trying the challenge the following oath is administered to the triors:

"You do each of you solemnly swear that you will well and truly try whether J. S. (the juror challenged) stands indifferent between the parties to this issue; so help you God."

The triors, being sworn, are instructed by the court in relation to the matters of law applicable to the duties about to be performed by them. Exceptions may be taken to any error in these instructions. *People v. Bodine*, 1 Denio, 281; *Freeman v. People*, 4 id. 9.

The juror challenged may then be examined under oath by the challenging party respecting the matters set forth as a ground of disqualification, and may also be cross-examined by the adverse party. See *People v. Christie*, 2 Abb. 256; S. C., 2 Park. Cr. 579; *Pringle v. Huse*, 1 Cow. 432. If from the evidence before them the triors are in doubt as to the impartiality of the juror it is their duty to find him not impartial. *People v. Thorn*, 4 C. H. Rec. 81; and see *Freeman v. People*, 4 Denio, 9. If the facts alleged as a ground of challenge are found untrue, the decision of the court or triors is final and is not subject to review. *Sanchez v. The People*, 22 N. Y. (8 Smith) 147; *Costigan v. Cuyler*, 21 N. Y. (7 Smith) 134; *O'Brien v. The People*, 36 N. Y. (9 Tiff.) 276; S. C., 3 Abb. N. S. 368; 2 Trans. App. 5. But where there is no conflict of evidence, the question is one of law, and, as the decision of the court, may be reviewed. *Stout v. The People*, 4 Park. Cr. 71; *The People v. Mallon*, 3 Lans. 224.

It is competent for either party to challenge first for principal cause; and failing to sustain it, he may then challenge to the favor and submit the same evidence to the triors that had been given on the challenge for principal cause; and the triors may upon the same evidence find the juror incompetent, because of prejudice or partiality. *People v. Mallon*, 3 Lans. 224; *Carnal v. The People*, 1 Park. Cr. 272. The foregoing common-law rules in relation to challenges of jurors were in force in this State prior to May 7, 1873. It was then provided by statute that "All challenges to jurors, both in civil and criminal cases, shall be tried and determined by the court only. Either party

Peremptory challenge — Right to begin.

may except to such determination, and upon a writ of error or certiorari, the court may review any such decision the same as other questions arising upon the trial." Laws of 1873, ch. 427, § 1. "On the trial of all felonies and misdemeanors, the prosecution shall be entitled to the same number of peremptory challenges as are or may be by law given to the defense." *Ib.*, § 2.

i. Peremptory challenge. Upon the trial of any issue of fact joined in a civil action, each party is entitled peremptorily to challenge two of the persons drawn as jurors. Laws of 1847, ch. 134.

A peremptory challenge is a waiver of all prior challenges to the same juror. *Freeman v. The People*, 4 Denio, 9.

Section 15. Right to begin.

a. In general. The right to begin is a matter of great importance in a trial by jury, as the party who begins has the right to make the closing address to the jury; and this latter right, when exercised by a skillful advocate, is often the means of securing a verdict in favor of the party holding the affirmative of the issue, even in a doubtful cause, and notwithstanding the clear and impartial charge of the judge. *Ashby v. Bates*, 15 Mees. & Wels. 589 (594); *Huntington v. Conkey*, 33 Barb. 218.

It is a general rule that the party upon whom the affirmative of the issue lies is entitled to begin. *Huntington v. Conkey*, 33 Barb. 218; *Lindsley v. European Petroleum Co.*, 41 How. 56; *Hoxie v. Greene*, 37 id. 97; *Elwell v. Chamberlin*, 31 N. Y. (4 Tiff.) 611. The affirmative of the issue must be understood to mean the affirmative in substance and not in form, and upon the whole record. *Huntington v. Conkey*, 33 Barb. 218; *Ashby v. Bates*, 15 Mees. & Wels. 589; *Geach v. Ingall*, 14 id. 95.

The test by which to determine who has the right to begin is to be found in the answer to the question which party should have a verdict if no evidence be given. *Huntington v. Conkey*, 33 Barb. 218. If it appears in answer to such question that the verdict ought to be given for one party, it follows that something must be done by the other party to prevent that consequence; and he who has to give evidence to prevent the result from being against him, must begin. *Geach v. Ingall*, 14 Mees. & Wels. 95 (100).

The party having the right to begin must exercise it; and on his failure to do so the court may compel him to open his case and produce his evidence. *Slauson v. Englehart*, 34 Barb.

 Right of plaintiff to begin — When defendant entitled.

198; *Brandford v. Freeman*, 5 Exch. 734; *Coxhead v. Huish*, 7 Carr. & Payne, 63.

b. When plaintiff entitled to begin. In all cases where the damages sought to be recovered in the action are unliquidated, the plaintiff has the right to begin. *Huntington v. Conkey*, 33 Barb. 218.

Thus, in all cases of slander, libel and other actions where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant. *Carter v. Jones*, 6 Carr. & Payne, 64; *Young v. Highland*, 9 Gratt. 16; *Hecker v. Hopkins*, 16 Abb. 301, note; *Littlejohn v. Greeley*, 13 id. 41; *Fry v. Bennett*, 28 N. Y. (1 Tiff.) 324. See *Harnett v. Johnson*, 9 Carr. & Payne, 206; *Chapman v. Rawson*, 8 Q. B. 673.

Whenever the plaintiff has any thing to prove, on the question of damages, or otherwise, he has the right to begin. *Huntington v. Conkey*, 33 Barb. 218; *Thurston v. Kennett*, 22 N. H. (2 Fost.) 151; *Belknap v. Wendell*, 21 N. H. (1 Fost.) 175; *Comstock v. Hadlyme Ecclesiastical Society*, 8 Conn. 254; *Lexington Ins. Co. v. Paver*, 16 Ohio, 324; *Bowen v. Spears*, 20 Ind. 146.

But, in other cases, where the damages are liquidated, or depend upon mere calculation, as the casting of interest, the party holding the affirmative of the issue has the right to begin; and the affirmative in such cases will be with the party against whom a verdict must be given, provided no evidence were given on the trial. *Huntington v. Conkey*, 33 Barb. 218; *Elwell v. Chamberlin*, 31 N. Y. (4 Tiff.) 611; *Hoxie v. Greene*, 37 How. 97; *Geach v. Ingall*, 14 Mees. & Wels. 95.

c. When defendant entitled. The rules above given determine in effect the cases in which a defendant is entitled to begin, viz., where he holds the affirmative of the whole issue, and no evidence is necessary on the part of the plaintiff to entitle him to recover. *Ib.*; *Lexington Ins. Co. v. Paver*, 16 Ohio, 324.

Thus, whenever the pleadings admit the plaintiff's whole cause of action, and attempt to avoid it by new matter, the defendant has the right to begin and close. *Thurston v. Kennett*, 22 N. H. (2 Fost.) 151; *Ayer v. Austin*, 6 Pick. 224. And so, if an answer admits the making and delivery of a promissory note, and sets up an affirmative defense, the affirmative is with the defendant, and he is entitled to open and close the case. *Lindsley v. Euro-*

Error in granting or refusing request — Opening case.

pean Petroleum Co., 41 How. 56; *Hoxie v. Greene*, 37 id. 97; *Huntington v. Conkey*, 33 Barb. 218.

This rule applies when the sole defense to an action on contract is want of consideration (*Hoxie v. Greene*, 37 How. 97; *Mills v. Oddy*, 6 Carr. & Payne, 728); payment (*Coxhead v. Huish*, 7 id. 63; *Smart v. Rayner*, 6 id. 720); duress (*Hoxie v. Greene*, 37 How. 97); alteration (*Barker v. Malcolm*, 7 Carr. & Payne, 101); want of capacity to contract (*Cannam v. Farmer*, 3 Exch. 698); want of capacity to sue (*Hoxie v. Greene*, 37 How. 97); non-joinder of necessary party (*Fowler v. Coster*, 3 Carr. & Payne, 463); usury (*Huntington v. Conkey*, 33 Barb. 218; *Elwell v. Chamberlin*, 31 N. Y. [4 Tiff.] 611); counterclaim (*Coxhead v. Huish*, 7 Carr. & Payne, 63; *Bowen v. Spears*, 20 Ind. 146), or any of these defenses combined (id.; *Hoxie v. Greene*, 37 How. 97).

In actions for unliquidated damages where the plaintiff is entitled to nominal damages, in case he should recover without proof of positive injury, a defendant setting up an affirmative defense will be entitled to begin, unless the counsel for the plaintiff will undertake to prove substantial damages. *Chapman v. Rawson*, 8 Q. B. 673; *City of Aurora v. Cobb*, 21 Ind. 492.

d. Error in granting or refusing request. The denial of the right to begin to the party entitled to it and claiming it at the proper time, is error for which a new trial will be granted; unless the court can see clearly that no injury or injustice resulted from the erroneous decision. *Huntington v. Conkey*, 33 Barb. 218; *Hoxie v. Greene*, 37 How. 97; *Lindsley v. European Petroleum Co.*, 41 id. 56; *Fry v. Bennett*, 28 N. Y. (1 Tiff.) 324.

It was intimated, however, in the case last cited that the question as to which party shall open and close the case should be regarded as one of practice, to be regulated by the discretion of the judge, and that his decision upon it is not a subject of exception.

Section 16. Opening case.

a. In general. After a cause has been called on, and a full jury has appeared, and challenges have been disposed of and the jury sworn, the cause is ready to proceed. The counsel for the plaintiff, or for the party entitled to begin, proceeds to open the case to the jury.

The object of an opening is to state briefly the nature of the action, the substance of the pleadings, the points in issue, the

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facts and circumstances of the case, and the substance of the evidence to be adduced in its support. *Ayrault v. Chamberlain*, 33 Barb. 229.

The manner and general character of the opening by the counsel for either party is to a great extent under the control and within the discretion of the judge at the circuit, and except in rare cases of arbitrariness or abuse of that discretion the decision of the judge will be final. *Ayrault v. Chamberlain*, 33 Barb. 229. See *Morris v. Wadsworth*, 17 Wend. 103. Under the practice in the courts of this State, unlike the rule in the English courts, each party is confined to a legitimate and proper opening of his own case; the plaintiff's counsel to a statement of his cause of action, and the defendant's counsel to a statement of his answer to the plaintiff's case and the evidence he proposes to give to sustain it. *Elwell v. Chamberlin*, 31 N. Y. (4 Tiff.) 611; *Ayrault v. Chamberlain*, 33 Barb. 229.

In opening the case, counsel should not state facts which under the laws of evidence they could not be permitted to prove, nor facts which they are not in a condition to prove. *Stevens v. Webb*, 7 Carr. & Payne, 60. Neither should the counsel go to the other extreme and omit the general statement of evidence upon which they intend to rely to maintain their action or defense. The evidence may be stated somewhat fully, or at least so far as may be essential to give the jury a proper understanding of the general course and theory of the prosecution or defense.

But the fact that either party has failed to state in the opening of his case all the evidence upon which he relies, or which may be necessary to make his case, will not affect his right to introduce such evidence upon the trial, nor entitle the adverse party to judgment. Evidence pertinent to the issue cannot be excluded merely because it was not embraced in the case stated in the opening. *Nearing v. Bell*, 5 Hill, 291. Nor can the judge direct a verdict for the plaintiff on the ground that the counsel for the defendant has in his opening failed to state a valid defense to the action; nor can he dismiss the plaintiff's complaint on the ground that the counsel for the plaintiff has failed to state a cause of action in his opening. *Sawyer v. Chambers*, 43 Barb. 622; S. C., 44 id. 42; *Stewart v. Hamilton*, 3 Rob. 672; S. C., 28 How. 265; 18 Abb. 298.

It has been held that an admission made by the plaintiff's

Opening case — By the plaintiff — By the defendant.

counsel in his opening, which is fatal to his case, may entitle the defendant to a judgment of dismissal. *Stewart v. Hamilton*, 3 Rob. 672; S. C., 28 How. 265; 18 Abb. 298.

But it may be doubted whether, in any case, an admission inadvertently made by a counsel in his opening, can be treated as evidence of the facts admitted, as against his client. Under the English practice the judge at a trial will not take the facts from the opening of the counsel on the opposite side. See *Machell v. Ellis*, 1 Carr. & Kirw. 682.

b. By the plaintiff. Under the English practice the counsel for the plaintiff is required to include in his opening the facts in reply to any distinct answer to the action which appears on the record by way of plea or notice, without waiting to see whether such defenses could be proved or not.

But, under the practice in this State, the counsel for the plaintiff is neither required nor allowed to state to the jury in his opening the facts he expects to prove in reply to the defense set up in the answer, nor to anticipate the opening of the counsel for the defendant by giving the details of the defense. The counsel should state his cause of action, and the evidence he proposes to introduce to sustain it, and he may also state the nature of the defense if it appears upon the record; but further than this he ought not to go. The judge at the circuit will not allow an opening by the plaintiff's counsel in respect to the defense except in an incidental way by a brief statement of its general character. *Ayrault v. Chamberlain*, 33 Barb. 229. See *Elwell v. Chamberlin*, 31 N. Y. (4 Tiff.) 611, 614.

c. By the defendant. After the plaintiff has put in his evidence and rested his case, the defendant may open his case to the jury by giving a statement of his answer to the plaintiff's case, and the evidence he proposes to give to sustain it. In such opening the counsel for the defendant should not comment in the way of summing up, after the English manner, upon the plaintiff's evidence, any further than is essential to a proper understanding by the jury of the defendant's evidence. *Ayrault v. Chamberlain*, 33 Barb. 229. See *Goss v. Turner*, 21 Vt. 437.

Where the defendant holds the affirmative, and consequently has the right to begin, he will of course open the case to the jury in advance of the plaintiff.

In opening his case it will be necessary for him to state the substance of the cause of action, the nature of the defense

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thereto, and the evidence he proposes to introduce in support of it. It is proper that he should state the exact issue raised by the pleadings, and the effect of the admissions made by the answer ; but under the foregoing principles it would be manifestly improper for the defendant in opening his case to anticipate the reply of the plaintiff to the affirmative defense. See *Goss v. Turner*, 21 Vt. 437.

Section 17. Evidence.

a. In general. It is to be presumed that the counsel, at least after the service of the notice of trial, have made all possible preparation to protect the interests of their clients. This preparation relates to two different subjects. The first is to examine the law in relation to the action upon its merits, and also as to the admissibility of any evidence which is not clearly admissible within the general rules of evidence. So, it is also proper to examine such legal questions as may be properly raised by the matters disclosed by the answer. The duty of investigating all legal questions will, of course, devolve upon the attorney or counsel who is to try the cause ; and to a young lawyer nothing can be of greater service than to make a full and careful brief for the trial of every cause of any importance. No point of law and no class of evidence need be overlooked in the hurry of the trial if this is properly done. It is not necessary to make a formal brief in every case, but a methodical and diligent examination of the points of law, and of the details of the evidence in a cause, are nearly indispensable to a certainty of success, or to a thorough and exhaustive trial on the merits. It may be convenient to state those points upon which a brief should be explicit.

A brief should consist of three parts : 1. An abstract of the pleadings ; 2. A statement of the case ; and, 3. A statement of the proofs. A more particular and formal brief may contain an enumeration of several important matters : 1. The names of the parties, their residence and occupation, the character in which they sue or defend, and the reason why they prosecute or resist the action ; 2. An abridgment of the pleadings, showing what facts are in issue, and what facts are admitted ; 3. A regular chronological and methodical statement of all the material facts ; 4. A summary of the points or questions in issue, and of the proof which is to support such issues, mentioning specially the names of the witnesses by whom the facts are to be proved, or, if it is to be established by written evidence, an abstract of such

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evidence; 5. The moral character of the witnesses should be mentioned: whether the moral character is good or bad, whether they are naturally timid or over zealous, whether firm or wavering; 6. If known, the evidence which will be introduced by the opposite party should be stated, and such facts or witnesses as are adapted to oppose, rebut, explain or answer it by new matter, should be mentioned. The facts should be so stated that it will be convenient at any moment to find the desired information which has been noted. Brevity is desirable, but, when the facts are material, they cannot be too numerous, and so when the argument is pertinent and weighty it cannot be too extended. 7. A full and careful statement of the legal principles involved, with a reference to the authorities which sustain them, is always an indispensable part of a lawyer's duty in the preparation of a cause for trial or for argument. It is not to be understood that it is recommended that a very formal and particular brief should be made for the trial of every action, since, in some cases, the facts may be few and the legal rules undisputed. But, when an inexperienced practitioner is required to meet counsel of long experience, the propriety of a thorough preparation will probably be fully appreciated, even by those who rely quite confidently upon fine, natural abilities.

It will not be attempted to consider in this connection the general rules of evidence, a brief outline of which has already been given in a previous volume. See vol. 2, pp. 638-732.

An attempt will, however, be made to point out, as briefly as may be, the rules relating to the mode of introducing evidence upon the trial, and the practice relating to the examination of witnesses. It should be borne in mind that the evidence in all cases is governed or materially influenced by the pleadings, and that it is generally necessary to prove every material fact that is put in issue, and no more.

b. Burden of proof. The question upon whom the burden of proof rests, in the first instance, is usually determined by the pleadings. It is a general rule that the burden of proof rests upon him who has the affirmative of the issue. 1 Greenl. Ev., § 74. By the affirmative must be understood the affirmative in substance and not in mere form. Hence, a plaintiff must, as a general rule, prove all the material allegations in his complaint, if they are denied, and the burden of proof is said to rest on him; but if the defendant admits the facts alleged in the complaint, and

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pleads and relies upon other facts as a bar to the action, then the burden of proof is thrown upon the defendant, and he must prove the facts pleaded in bar. *Ross v. Gould*, 5 Me. (5 Greenl.) 204.

As the determination of the two questions, who has the right to begin, and upon whom is the burden of proof, depends upon the determination of the same question, the rules laid down in a previous section may be profitably consulted. See *ante*, p. 111 to 113.

One of the surest tests for ascertaining upon which side the affirmative really lies is to consider which party would be successful if no evidence at all were given; or, what amounts to the same thing, to examine whether, if the particular allegation to be proved were struck out of the answer or other pleading, there would or would not be a defense to the action, or an answer to the previous pleading. The party against whom a verdict must necessarily be rendered, if no evidence be given, holds in all cases the affirmative of the issue, and upon him rests the burden of proof, unless in the few exceptional cases which will be hereafter noticed. *Elwell v. Chamberlin*, 31 N. Y. (4 Tiff.) 611.

Thus in an action for the recovery of money loaned, if the answer contains a general denial of the complaint, the burden of proof will evidently be on the plaintiff. But if there is no denial of the loan of the money, or of the allegations in the complaint, but the defendant interposes an affirmative defense alone, in which he alleges payment of the money loaned, the burden of proof is on the defendant to show payment because the answer admits the loan, and the only question to be tried is, whether it has been repaid, and on that issue the defendant holds the affirmative. So, where an action is brought upon a promissory note which is set out in the complaint, and the answer admits the making of the note, but sets up the defense of usury, or any other similar plea, by way of confession and avoidance, the plaintiff will be entitled, without giving any evidence, to a verdict for the amount of the note, unless the defendant establishes his defense, and the affirmative of the issue, and the burden of proof, is clearly upon the defendant. *Elwell v. Chamberlin*, 31 N. Y. (4 Tiff.) 611; *Hoxie v. Greene*, 37 How. 97; *Huntington v. Conkey*, 33 Barb. 218. But where the defendant does not deny the complaint, but sets up the statute of limitations as a defense, the burden of proving that the cause of

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action is not barred by the statute, is cast upon the plaintiff. *Porter v. Kimball*, 3 Lans. 332; 2 Greenl. Ev., § 431.

There are cases in which both parties hold the affirmative as to the issues to be tried, as where the plaintiff sues for the recovery of money loaned, as in the case before stated, and the defendant interposes a general denial, and also a claim for a set-off. In such cases the plaintiff would be bound to prove his case; and if he does so and then rests, the defendant will be required to establish his set-off by evidence, or it will not be allowed.

In determining who is bound to introduce evidence to sustain his case, it is important to recollect that there are cases in which some legal presumption stands for proof until it is rebutted; and that, although the issue may, in form, cast the affirmative on a party, yet this legal presumption is still sufficient proof until the presumption is rebutted by evidence on the other side.

Whenever the law presumes in favor of the affirmative, it lies on the party who denies the fact to prove the negative. In an action upon a bill of exchange or a promissory note, if the defendant answers that there was no consideration for it, he must prove that fact, for the law presumes a good consideration. *Lacey v. Forrester*, 2 C. M. & R. 59; 5 Tyrw. 567.

So, where the negative involves a criminal omission, by the party, and, consequently, where the law, upon general principles, presumes his innocence, the affirmative is presumed; and therefore, where an action was brought against a person for putting a dangerous commodity on board of a vessel, as freight, without giving notice thereof to the captain or other person on board, whereby a loss ensued, it was held that the plaintiff was bound to prove that the notice was not given. *Williams v. East India Co.*, 3 East, 192.

It is a general rule that a party cannot be required to prove a negative, but this rule is not without exceptions. Thus where an action is brought to recover damages for personal injuries arising from the alleged negligence of another, it is the duty of the plaintiff to prove, not only that the injury was caused by the defendant's negligence, but also that he, the plaintiff, did not contribute to the injury by any negligence on his own part. This proof, in some form, constitutes a part of the plaintiff's case: and there is no presumption of negligence against either party. Circumstances may show, without further evidence,

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that there was no contributing negligence on the part of the injured party; but, in the absence of such circumstances, there must be direct evidence of the fact. *Warner v. New York Central R. R. Co.*, 44 N. Y. (5 Hand) 465; *Button v. Hudson River R. R. Co.*, 18 N. Y. (4 Smith) 248; *Holbrook v. Utica & Schenectady R. R. Co.*, 12 N. Y. (2 Kern.) 236; *Parrott v. Knickerbocker Ice Co.*, 2 Sweeny, 93; *Curtis v. Rochester & Syracuse R. R. Co.*, 18 N. Y. (4 Smith) 534. See *Murphy v. Deane*, 101 Mass. 455. So, in an action to recover a penalty for selling spirituous liquors without a license, it will be sufficient for the plaintiff to prove the sale of such liquors, without proving that the defendant had no license. That evidence is a matter of defense, and the defendant will be bound to show a valid license or he will be liable for the penalty. *Potter v. Deyo*, 19 Wend. 361; *Mayor, etc., of N. Y. v. Mason*, 1 Abb. 344; S. C., 4 E. D. Smith, 142.

In an action against a defendant who sets up a bankrupt's discharge, the plaintiff is bound to prove any matter which he claims invalidates it, since it is presumed to be valid. *Sherwood v. Mitchell*, 4 Denio, 435. The defendant would, however, be bound to prove the discharge itself, like any other affirmative matter; but when proved, it would be presumed valid.

When a party holding the affirmative of an issue introduces evidence which, if uncontradicted, proves the facts alleged by him, the burden of proof is said to be changed to the other side. But it must not be understood that the party bound to prove a fact is thereby relieved from this obligation; or that the other party, to entitle him to a verdict, is required to satisfy the jury that the facts were not as alleged by his adversary. The party holding the affirmative is still bound to satisfy the jury affirmatively of the truth of the facts alleged by him, or he will not be entitled to a verdict. *Lamb v. Camden & Amboy R. R.*, 46 N. Y. (1 Sick.) 271. See *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. (2 Sick.) 282, 292.

c. Competency of witnesses. The old rules relating to the competency of witnesses may be found in any work on evidence. The changes made by the Code and late statutes in relation thereto are as follows: It is provided by section 398 of the Code that "no person offered as a witness in any action or proceeding in any court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or pro-

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ceeding, or because he is a party thereto, except as provided in the next following section of this act."

The exception is as follows: "No party to an action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title, by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, insane, or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence. Code, § 399.

Evidence of the testimony of a deceased person, upon a former trial, is inadmissible where, if living, he would not be a competent witness under this section (399). *Eaton v. Alger*, 47 N. Y. (2 Sick.) 345.

The person through whom a party to an action derives title is not competent as a witness to prove transactions with a deceased person, as against the *grantee* of the latter; for, although grantees are not named, they are within the reason of the act, and the word "assignee" will include them. *Mattoon v. Young*, 45 N. Y. (6 Hand) 696.

It is also provided by statute that "in any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as hereinafter stated, be competent and compellable to give evidence, the same as any other witness on behalf of any party to such suit, action or proceeding." Laws of 1867, ch. 887, § 1.

"Nothing herein contained shall render any husband or wife competent and compellable to give evidence for or against the other, in any criminal action or proceeding (except to prove the

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fact of marriage in case of bigamy), or in any action or proceeding instituted in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation." Laws of 1867, ch. 887, § 2.

"No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage." Laws of 1867, ch. 887, § 3.

It would seem that the legislature had in effect made a husband or wife competent witnesses, the one for or against the other in all cases where they are parties to an action, by an amendment to the Code in 1860. See *Matteson v. N. Y. Central R. R. Co.*, 62 Barb. 364; 35 N. Y. (8 Tiff.) 487.

Under the provisions of this statute, in an action between husband and wife, either is a witness in his or her behalf against the other, save in the cases excepted in that act. *Southwick v. Southwick*, 49 N. Y. (4 Sick.) 510; 1 Sweeny, 47. The act applies to all trials had in actions which were pending when it took effect; and under it the husband or wife may testify to conversations and communications had prior to the taking effect of the act, unless such conversations or communications were confidential. *Ib.* See *Minier v. Minier*, 4 Lans. 421.

No physician, surgeon, minister of the gospel, or priest of any denomination is, in general, a competent witness in respect to any information acquired by him in a strictly professional capacity. 2 R. S. 406 (422), §§ 72, 73. See *People v. Gates*, 13 Wend. 312; *Matteson v. N. Y. Central R. R. Co.*, 62 Barb. 364.

The Code provides also that if any original pleading or paper is lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original. Code, § 422.

The statutes in relation to the competency of witnesses, so far as the same may be affected by religious belief, declare that every person believing in the existence of a Supreme Being who will punish false swearing, shall be admitted to be sworn if otherwise competent; and no person shall be required to declare his belief in the existence of a Supreme Being, or that he will punish false swearing, or his belief or disbelief of any other matter, as a requisite to his admission to be sworn or to testify in any case; but the belief or disbelief of every person offered as a witness may be proved by other and competent testimony. 2 R. S. 408 (425), §§ 87, 88. The constitution also declares that no person

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shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief. Const., art. 1, § 3. But while such matters cannot affect the competency of a witness, they may affect his credibility. *Stanbro v. Hopkins*, 28 Barb. 265.

The provisions of the statute above cited are not to be construed to prevent any court before whom an infant or a person apparently of weak intellect shall be produced as a witness, from examining such person, to ascertain his capacity, and the extent of his religious and other knowledge; nor are they to be construed to prevent a court from inquiring of any person what are the peculiar ceremonies observed by him in swearing, which he deems most obligatory. 2 R. S. 408 (425), § 89.

d. View. The Revised Statutes provide that whenever, in certain actions relating to real property, the court in which the action is pending shall be satisfied that a survey of any premises in the possession of either party, or of any boundary line between the parties, or between the lands of either of them and the lands of other persons, is necessary or expedient, to enable either party to declare, plead or prepare for trial, or for any other proceeding in such action, it may by rule of court, upon the application of either party, order that such party have leave to make such survey. 2 R. S. 341 (352), § 13.

The order must specify the premises or boundary lines to be surveyed by a description as definite as may be, and a copy of the same must be served, previous to such entry, on the owner or occupant of the premises upon which it may be necessary to enter to make such survey. 2 R. S. 341 (352), § 14.

The party obtaining such order, his necessary surveyors, servants and agents, may enter upon any premises necessary for the purpose of making such survey, and may there make the same after having served the rule as before mentioned. No person acting under such order will be liable to any action of trespass or other action, for so doing; but every such person will be liable to an action on the case for any unnecessary injury caused by him. 2 R. S. 341 (352), § 15.

The statute also provides that no writ of view shall hereafter be allowed in any action for the recovery of real estate, or the possession thereof, except when otherwise specially provided for; but any judge of the court in which the action is pending, and any other officer who may be authorized to perform the

View — Plaintiff's evidence.

duties of such judge at chambers, shall have power, whenever he shall think proper to do so, to order the plaintiff to deliver to the defendant a particular description of the premises demanded, in the same manner and subject to the same provisions, as in cases where bills of particulars may be required in personal actions. 2 R. S. 341 (352), § 16.

Under the English practice, whenever it appears to the court in actions of waste, trespass *quare clausum fregit*, and other actions, that it is proper and necessary that the jurors who are to try the issue, for the better understanding of the evidence, should have a view of the lands or place in question, the court or judge will grant a rule or order for such view. The jury, or a part of them, are then taken by the sheriff to the place in question, at some convenient time before the trial, and two persons appointed by the court, frequently the attorneys in the action, thereupon point out to them the matters involved in the controversy. Tidd's Pr. 795; 1 Archb. 371.

This practice was also in force in this State under the old system, but seems to have fallen into disuse under the restrictions placed upon it by statute. See Grah. Pr. 880, 881.

e. Plaintiff's evidence. The party entitled to begin, having opened his case to the jury, proceeds to call his witnesses in its support. If not objected to by the adverse party and set aside as incompetent, the witnesses, as they are called, are sworn by the clerk in one of the modes prescribed by statute, and examined in chief by the party in whose behalf they are summoned. They may be then cross-examined by the defendant, if the plaintiff is the party entitled to begin, and re-examined, if necessary, by the plaintiff.

Regularly, the party entitled to begin must exhaust all the testimony in support of his side of the issue before the opposite party is heard; and he can, in strictness, introduce no evidence afterward, save in reply. The judge may, however, allow a departure from this rule, but the party cannot claim that he shall do so as a matter of right. *Ford v. Niles*, 1 Hill, 300; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. (2 Sick.) 282; *Meyer v. Goedel*, 31 How. 456; *Anthony v. Smith*, 4 Bosw. 503; *Shepard v. Potter*, 4 Hill, 202; *Hastings v. Palmer*, 20 Wend. 225; *Leland v. Bennett*, 5 Hill, 286; *Romertze v. East River National Bank*, 2 Sweeny, 82; 49 N. Y. (4 Sick.) 577.

Defendant's evidence — Evidence in reply — Rebutting evidence — General practice.

f. Defendant's evidence. After the plaintiff has made a *prima facie* case and rested, the defendant states his case to the jury and calls his witnesses. Each witness called is examined by the defendant and may then be cross-examined by the plaintiff, and re-examined by the defendant, in the same manner, and subject to the same rules as above stated in respect to the witnesses for the plaintiff.

After the plaintiff has made a *prima facie* case and rested, the defendant may not attempt to disprove or rebut any fact which the plaintiff has proved, but may introduce evidence to establish an independent substantive fact, showing a discharge of the claim which the plaintiff has proved against him. Upon the issue thus raised the defendant takes the affirmative, and may properly rest after establishing a *prima facie* defense, without anticipating what answer the plaintiff will make to it. See *Goss v. Turner*, 21 Vt. 437.

g. Evidence in reply. After the defendant has rested, the plaintiff may introduce evidence in denial, or by way of avoidance of the evidence given by the defendant; but, as has been already shown, he cannot, as a matter of right, introduce further evidence in support of the case originally made by him, even though the instruments of evidence were, through no fault of his own, unavailable at the time when he rested. *Ford v. Niles*, 1 Hill, 300.

h. Rebutting evidence. If the evidence on behalf of the plaintiff in reply was in avoidance of the defendant's evidence, the defendant may introduce new evidence rebutting that given in reply. Upon the principle above stated the defendant will not be entitled, as a matter of right, to introduce further evidence in support of his defense, as originally made, but will be restricted to such evidence as goes to disprove the reply.

Rebutting evidence is such as contradicts, modifies, explains or varies the evidence of the other party. *Romertze v. East River National Bank*, 2 Sweeny, 82; 49 N. Y. (4 Sick.) 577.

i. General practice. It is a general rule that the time, manner and order of receiving evidence upon the trial is a matter of discretion with the judge at circuit, and is not reviewable on appeal. *Ib.*; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. (2 Sick.) 282; *Bedell v. Powell*, 13 Barb. 183; *Seeley v. Chittenden*, 4 How. 265.

Thus, after the plaintiff has rested, it is in the discretion of the

General practice — Examination of witnesses, rules for.

court whether to allow the case to be re-opened and further witnesses called. *Solomon v. Central Park, North & East River R. R. Co.*, 1 Sweeny, 298; *Henry v. Lowell*, 16 Barb. 268; *Peckham v. Leary*, 6 Duer, 494. See letter *e*, ante, 124.

The same rule applies to the defense. *Anthony v. Smith*, 4 Bosw. 503; *Williams v. Hayes*, 20 N. Y. (6 Smith) 58; *Burger v. White*, 2 Bosw. 92. But if, after a party has rested, the judge recalls one of his witnesses, and, by examining him, elicits evidence unfavorable to the party, the case will be thereby re-opened, and the party may then proceed to introduce further evidence in support of his case as an absolute right. *Shepard v. Potter*, 4 Hill, 202.

It is within the discretion of the judge at the trial to allow a witness to be recalled, and to explain, qualify or contradict his former statements, and his decision cannot be reviewed. *Williams v. Sargeant*, 46 N. Y. (1 Sick.) 481. The refusal of permission to recall a witness is equally discretionary. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. (2 Sick.) 282.

The court may also, in its discretion, limit the number of witnesses to be examined to a particular point collateral to the issues to be tried, and the exercise of that discretion cannot be reviewed upon an appeal from the judgment. *Spear v. Myers*, 6 Barb. 445; *Anthony v. Smith*, 4 Bosw. 503; *Nolton v. Moses*, 3 Barb. 31; *People v. Cook*, 8 N. Y. (4 Seld.) 67, 77. But that discretion should not be exercised except in a case clearly calling for interposition; and where a plaintiff has called and examined one witness to establish a fact, and the defendant has examined one witness who contradicts the first, a refusal of the judge to permit the defendant to examine another witness will be a ground for setting aside the verdict. *Ward v. Washington Ins. Co.*, 6 Bosw. 229. The case must be a very peculiar one, which will justify the court in rejecting evidence, because the fact which it tends to prove is sufficiently proved already. *Eakin v. Brown*, 1 E. D. Smith, 36. A party should not, as a general rule, be limited as to the number of witnesses to be examined as to the material facts at issue. *Ib.*; *Hubble v. Osborn*, 31 Ind. 249.

j. Examination of witnesses, rules for. While it may be possible to give certain general rules which will in all cases determine the competency or admissibility of the evidence which a party may desire to adduce upon the trial in support of his cause, it is obviously impossible to give any rule or set of rules,

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which will unfailingly point out the best mode of adducing such evidence, when it is to be taken from the lips of living witnesses. The mode of conducting the examination of witnesses is a subject beyond the reach of arbitrary rules. Success in this branch of practice depends upon the practical knowledge derived from experience and the close study of human nature, rather than from the theoretical knowledge derived from books. Much valuable information may, however, be derived from the rules for the examination of witnesses as given by the text-writers, as for example, the rules of Quintilian to be found in Best on Evidence, the "Golden Rules" of David Paul Brown, republished in the American edition of Ram on Facts, and the advice of Mr. Cox, in his work entitled "The Advocate, his training, practice, rights and duties," which may also be found in an abridged form in the appendix to Ram on Facts. Many of the practical suggestions here given are derived from these sources.

There are many things to be considered in determining the best mode of conducting the examination of each individual witness.

The mental characteristics of the witness, as whether timid or over confident, intelligent or stupid ; the peculiar relations that may exist between the witness and the parties ; and the probable or possible interest which the witness may have in the event of the action, should all be considered in determining the mode of conducting his examination.

It is obvious that the advocate should not pursue the same mode of examining a witness, known to be hostile to his client, that he would pursue in examining one known to be favorable to his cause. Neither should his treatment of the timid witness be the same as his treatment of the bold and over confident. A timid witness should never, on his direct examination, be examined as to a material point in the case before his courage is restored, as, no matter how conscientious the witness, and how well informed as to the facts, his evidence, when given under the influence of fear, will be confused and contradictory. A few unimportant and preliminary questions asked in a friendly conversational tone will usually re-assure the witness, and obviate the necessity of explaining away contradictions in his statements. Whether the same thoughtfulness should be exercised in cross-examining a timid witness for the adverse party, would

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of course depend on the nature and effect of the evidence given on the examination in chief.

The opposite course should be pursued with the over-confident and over-zealous witness, who volunteers evidence for which he has not been asked. Witnesses of this class should be examined with great gravity and ceremony, and if this fails to repress their assurance, they should be at once requested, kindly but peremptorily, to answer simply the questions asked. If, however, the over-confident witness is called by the adverse party, it may be advisable in his cross-examination to encourage his weakness until his excessive zeal leads into statements absurdly extravagant.

If a party's own witness is found to be unfriendly, he should be dismissed from the stand as speedily as possible. If his answers are unfavorable, he is still presumed to be giving such a construction to the facts he states as are most favorable to the party calling him, and therefore every unnecessary answer drawn out is a direct injury. His testimony cannot be impeached or even indirectly assailed, further than to show by other witnesses the truth of the facts, in respect to which he has been guilty of misstatements. If, on the other hand, the hostile witness is called by the adverse party, his hostility should be stimulated, until it is plainly apparent to the most stupid of the jury.

The reason for the rule above given suggests the impropriety of calling a witness when the adverse party will be compelled to call him. A disregard of the rule thus suggested places the party at the mercy of the witness, and enables the adverse party to profit by every unfavorable answer, and at the same time to weaken by a cross-examination the effect of such favorable testimony as may be elicited.

Another universal rule, relating to the examination of a witness, prohibits the asking of any question without a sufficient reason, and also the asking of any question which, if objected to as irrelevant, cannot in some way be connected with the case. As a rule, the party whom the court will not sustain will not be sustained by the jury.

An objection should never be taken to a question asked by the adverse party, unless there is valid reason therefor; neither should an improper question which may damage your client's case be allowed to pass without objection, except for a similar good reason.

Examination of witnesses, rules for — Direct examination.

The general manner and deportment of the examining counsel must, of course, be determined by circumstances. He should never allow his temper to be ruffled by the stupidity of a witness, nor by evasive or unfavorable answers. The jury often weigh the importance of evidence by its effect on counsel.

The rules of court provide that on trials of issues of fact one counsel only on each side shall examine or cross-examine a witness; and that during such examination the examining counsel shall stand. They further provide that the testimony, if taken down in writing, shall be written by some person other than the examining counsel. But the justice who holds the court may otherwise order or dispense with this requirement. Rule 37, Sup. Ct. These rules, however, are not very strictly observed in practice.

k. Direct examination. When a witness has been regularly sworn he is first examined by the party who produces him, and this examination is called the direct examination, or examination in chief. The adverse party is then at liberty to examine the witness, and this examination is termed a cross-examination. After the conclusion of the cross-examination, the party calling the witness may examine him again, the examination in this case being called the re-examination.

The office of a direct examination, or examination in chief, is to lay before the court and jury the whole of the evidence of the witness that is relevant and material. The mode in which this evidence shall be drawn out on the examination is, to a great degree, within the discretion of the court.

The first essential to the proper examination of a witness is, that the examining counsel should have a clear knowledge of the leading facts to be proved by the witness. For the purpose of avoiding all possibility of omitting an important fact, the counsel should provide in advance a synopsis of the leading facts to be proved by the witness.

If the witness is ordinarily intelligent, after a few preliminary questions designed to bring him to the main point in issue, he should be permitted to narrate the facts in his own way, with such occasional questions only as will tend to render his narrative clear and connected. As a general rule leading questions, or such as suggest the answer expected, will not be allowed on the direct examination. This rule is based on the supposition that the witness is favorable to the party who calls him, and is accordingly relaxed whenever it clearly appears that the witness

Direct examination — Cross-examination.

is hostile, or that a more searching mode of examining him is necessary to elicit the truth. *Williams v. Eldridge*, 1 Hill, 249; *Clarke v. Saffery*, 1 Ryan & M. 126; *Regina v. Chapman*, 8 Carr. & Payne, 558. Leading questions are permitted on a direct examination when an omission in the witness's testimony is evidently caused by a want of recollection, which a suggestion may assist. *Cheaney v. Arnold*, 18 Barb. 434. Whether or not a leading question may be put to a witness is a matter of discretion with the judge at the trial, and the allowance or exclusion of leading questions has ceased to be considered a matter to be reviewed on appeal. *Black v. Camden & Amboy R. R. & Trans. Co.*, 45 Barb. 40; *Walker v. Dunspaugh*, 20 N. Y. (6 Smith) 170; *Downs v. N. Y. Central R. R. Co.*, 47 N. Y. (2 Sick.) 83; *Budlong v. Van Nostrand*, 24 Barb. 25; *Cheaney v. Arnold*, 18 id. 434.

A party having a witness on the stand may be called upon by his adversary to state what he proposes to prove by the witness, and in that case he must state it so far as to show its relevancy. *Beal v. Finch*, 11 N. Y. (1 Kern.) 128; S. C., 9 How. 385. Thus, where a conversation between persons is offered in evidence, it is the duty of the party offering it to disclose how it may be material. *Trustees of First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.*, 23 How. 448.

1. *Cross-examination.* The right to cross-examine a witness commences when the examination in chief is concluded. If a witness is sworn and gives any evidence, no matter how slight, he is a witness for all purposes, and may be cross-examined; or, if a witness is sworn and would be competent to give evidence for the party calling him, it is said by some text writers that the adverse party will be entitled to cross-examine him, although he has not been examined in chief. But, if a witness is called by a party merely for the purpose of producing a written instrument belonging to the party, which is to be proved by other witnesses, he need not be sworn, and, if not sworn, will not be subject to cross-examination. So, if a counsel calls a witness by mistake, and discovers the mistake before he puts a question to him, the witness, though sworn, will not be subject to cross-examination. So where a witness has been asked only an immaterial question, and his evidence is stopped by the court, the other party has no right to cross-examine him.

After a witness has been examined in chief, the adverse party

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is at liberty to cross-examine him. The power and opportunity of cross-examination, it will be recollected, is one of the principal tests which the law has devised for the ascertainment of truth, and is indeed a most efficacious test. By this means the situation of the witness, with respect to the parties and the subject of litigation — his interests, his motives, his inclination and prejudices, his means of obtaining correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used these means, his powers of discerning facts in the first instance, and his capacity for retaining and describing them — are fully investigated and ascertained, and submitted to the consideration of the court or jury, who have an opportunity of observing the manner and demeanor of the witness, circumstances which are often of as high importance as the answers themselves. It is not easy for a witness, who is subjected to this test, to impose upon the court; for, however artful the fabrication of the falsehood may be, it cannot embrace all the circumstances to which the cross-examination may be extended; the fraud is, therefore, open to detection for want of consistency between that which has been invented, and that which the witness must either represent according to the truth for want of previous preparation, or misrepresent according to his own immediate invention. In the latter case, the imposition must obviously be very liable to detection, so difficult is it to invent extemporaneously, and with a rapidity equal to that with which a series of questions is proposed, in the face of a court of justice, and in the hearing of a listening and attentive multitude, a fiction consistent with itself and the other evidence in the case.

The purpose of a cross-examination is either to impugn the credit of a witness or to get him to explain or give a color to what he has already stated in his examination in chief, so as to render it less unfavorable to the party cross-examining. A witness may be cross-examined for the purpose of showing that he has no great respect for the moral obligation of the oath he has taken (*Stanbro v. Hopkins*, 28 Barb. 265); or to show that, however clearly he may design to speak the truth, his means of knowledge upon the subject of his evidence were so limited that he may possibly have been deceived in what he asserted in his examination in chief; or to show that he is interested in the event of the action, for although interest would not disqualify him from testifying, it would be a question whether it affected

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his credit; or to show that he has been arrested and punished for offenses, or otherwise so degraded that no dependence can with safety be placed upon his testimony, or to impeach his veracity by showing that he has, at other times, made declarations by parol or in writing, or done acts inconsistent with the evidence he has given upon his examination. But, in this latter case, the examining counsel will not be allowed to impeach the testimony of the witness, by proving his former declarations or acts to the contrary, unless the witness has first been cross-examined particularly as to his having made such declarations or done such acts. See *Romertze v. East River National Bank*, 2 Sweeny, 82; *Sloan v. New York Central R. R. Co.*, 45 N. Y. (6 Hand) 125; *Lee v. Chadsey*, 2 Keyes, 543; 3 id. 225. This subject will be more fully explained hereafter when treating of impeaching witnesses.

The credibility of a witness is compounded of his knowledge of the facts he testifies, his disinterestedness, his integrity, his veracity, and his being bound to speak the truth by such oath as he deems obligatory upon his conscience.

If he be deceived in the facts, no dependence of course can be placed in his testimony, however unimpeachable his character may be for integrity and veracity. But if a witness can give the substance of a conversation in relation to the matter in issue, his testimony is not to be excluded because he cannot give all the conversation which took place at the same time in relation to other matters. *Pope v. Machias Water Power Co.*, 52 Me. 535.

Where there is a doubt, therefore, whether the evidence given by a witness be not founded on some misconception, it is the duty of the counsel who cross-examines him to question as to the sources of his knowledge, his reasons for believing the fact to be as he has stated, his reasons for recollecting it, the circumstances attending its occurrence, whether it was light or dark, whether few or many persons or none at all were present, whether it was late or early in the day, and whether he was near or distant at the time it occurred, and the like, so that the court and jury may be able to judge of the degree of confidence they may repose in the witness's testimony.

But, valuable as the right of cross-examination is, it is sometimes a dangerous instrument in the hands of an unskillful or inexperienced person. If, by any unfortunate or unskillful question, put on cross-examination, a fact be extracted or elicited

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which would not have been evidence upon an examination in chief, it then becomes evidence against the party cross-examining. But a witness is not allowed voluntarily to obtrude inadmissible evidence, and if he does so, it is not to be considered as evidence in the action, and the court and jury should give it no consideration whatever. This a just and most important rule; for a fraudulent and subtle witness will sometimes endeavor to baffle and annoy his cross-examiner for the purpose of deterring him from pursuing his course by introducing into his answers matters which are foreign to the question put, and which are unfavorable to the cross-examining party.

With regard to the relevancy to the matters in issue of questions which may be put on cross-examination, it is to be observed that considerable latitude is allowed in this respect, where the tendency of the questions is to affect the credit of the witness. A witness may be asked questions affecting his own character, and consequently his credit, though such questions have no relation to the matters in issue. But a witness cannot be cross-examined as to any fact wholly irrelevant to the matters in issue, and which would in no way affect his credit, and still less can he be cross-examined as to such facts for the purpose of contradicting him by other evidence, and in this manner to discredit his testimony. *Carpenter v. Ward*, 30 N. Y. (3 Tiff.) 243. See *Gandolfo v. Appleton*, 40 N. Y. (1 Hand) 533. And if a witness answers such an irrelevant question before it is disallowed or withdrawn, evidence cannot afterward be admitted to contradict his testimony on the collateral matter. *Plato v. Reynolds*, 27 N. Y. (13 Smith) 586.

The principle of the rule which excludes an inquiry into such collateral matters is that it would render an inquiry which ought to be simple, and confined to the matter in issue, intolerably complicated and prolix, by causing it to branch out into an indefinite number of collateral issues.

Witnesses are frequently cross-examined in relation to writings, such as deeds, contracts, letters, papers and documents; and the examination may be conducted with a view either to establish in evidence the *contents* of the writing as *material* to the cause, or to *test* the *memory* or the *credit* of the witness. When the object of the cross-examination is to establish the writing in evidence, the cross-examining counsel has no right to represent or state the contents of the writing in the form of a

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question, and then ask the witness whether he wrote such paper or writing to any person, with such contents, or contents to the like effect, without first showing the writing to the witness, and asking him whether he wrote the letter or paper. *The Queen's Case*, 2 Brod. & Bing. 284-315; *Speyer v. Stern*, 2 Sweeny, 516. If the paper is shown to the witness, and he admits that he wrote it, the whole paper will be made evidence when introduced at the proper time. So, again, on cross-examination, it is permitted to show a witness a part of a letter, or one or more lines, and not the whole of the letter, and then ask him if he wrote that part of it. *Ib.* But, if the witness does not state whether he did or did not write what is shown him, he cannot be cross-examined as to the contents of that letter, because the letter itself is the best evidence. *Ib.*

If the witness admits he wrote the letter, he cannot be cross-examined as to the contents by means of questions put to him by the cross-examining counsel, but the letter itself must be read, to show whether it contains such statements as are embodied in the question. *Ib.*

If the letter or paper is admitted by the witness, it is sometimes a question when it shall be introduced in evidence. The general rule is, that it is to be read as the evidence of the cross-examining counsel as part of his evidence, in his turn, after he shall have opened his case; but if the counsel who is cross-examining suggests to the court that he wishes to have the letter or paper read immediately, in order that he may, after the contents of that paper shall have been made known to the court, found certain questions upon such contents, which could not well or effectually be done without reading it, that becomes an excepted case, and for the convenient administration of justice, it is permitted to be read at the suggestion of the counsel; but considering it, however, as a part of the evidence of the counsel proposing it, and subject to all the consequences of having it considered as a part of his evidence. *Ib.*

On cross-examination counsel are not permitted to ask a witness whether he has made *representations* of a particular nature, and not specifying in his question whether the question refers to representations in writings or in words. *Ib.* In such a case the opposite counsel have a right to interpose and ask the court to direct the cross-examining counsel to ask whether the representation was in writing or was spoken words. *Ib.*

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But it may be properly asked, on cross-examination, whether the witness has *said* such a thing, for that implies that it was words spoken and not written. *Ib.*

The instances in which evidence is rejected when it is sought to show the contents of a writing, by examining a witness, is founded upon the principle, that the paper is the best evidence of its contents. But it frequently happens that the cross-examination of a witness, as to what he has before said or written on the subject of inquiry, is material only as a test to try his memory and his credit.

Such evidence is usually admissible, for no other purpose than to try the credit or the capacity of the witness. What a witness stated on a former occasion may be very material evidence to contradict him, or to impeach his testimony, but can rarely be evidence of the fact stated ; and it is a remarkable circumstance that in the course of inquiry in the case which occasioned so much discussion on the subject, the question was never directly raised, whether a cross-examination as to something written by the witness, for the purpose, not of proving any fact in the cause, but simply of trying the credit or ability of the witness, was subject to the same strict rules as governed an examination for proving material facts ; and whether the witness might not be cross-examined as to what he had written, without producing the writing, where, although not proved to be lost, it was not in the possession of the examining party. But it has been decided in the English courts, that, upon a cross-examination, a witness cannot, even for the purpose of discrediting him, be asked as to the contents of a written paper, which is neither produced, nor its absence accounted for. *Macdonnell v. Evans*, 11 C. B. (2 J. Scott) 930. See *Hollingham v. Head*, 4 C. B. (J. Scott) N. S. 388. In *Bellinger v. People*, 8 Wend. 595, a letter in the handwriting of the witness was shown to him, and he was then asked : "Did you write that letter in answer to a letter charging you with forgery ?" And it was held that the question was inadmissible for any purpose, inasmuch as it was an attempt to get at the contents of a written document, which, for any thing that appeared, might have been produced.

This question must be deemed settled, so far as this State is concerned, by numerous adjudications ; and it may be laid down as a settled rule, that, where, on a cross-examination, a witness is asked whether he has been convicted of a specified crime, and an objec-

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tion is taken to the question, the evidence will be excluded, on the ground that the record is the best evidence of the matter. *Newcomb v. Griswold*, 24 N. Y. (10 Smith) 298; *Rathbun v. Ross*, 46 Barb. 127; *Tift v. Moor*, 59 id. 619. The same rule applies to a question whether a witness has been indicted for any alleged offense. *Lee v. Chadsey*, 2 Keyes, 543; S. C., 3 id. 225; *Peck v. Yorks*, 47 Barb. 131. The proper proof of the fact in the latter case is the indictment, or a certified copy of it. *Ib.* But this rule is based solely on the ground that the fact is susceptible of proof of a higher degree than parol evidence, and the rule fails when the reason therefor ceases to exist. Thus, it is competent to ask a witness on cross-examination, with a view to impair his credibility, whether he has been in jail or State prison, and how much of his life he has passed in such places, as the question relates to a fact of which the witness must have knowledge, and does not involve questions of jurisdiction and proceedings of a court of which the witness may not be competent to speak. *Real v. The People*, 42 N. Y. (3 Hand) 270.

But where a question is put to a witness, asking him whether he has not made certain specified statements in an affidavit not produced, the evidence may be properly excluded, on the ground that the affidavit is the best evidence upon that subject. *Newcomb v. Griswold*, 24 N. Y. (10 Smith) 298.

A party having produced a document for the purposes of cross-examination, is not bound to read it before he comes to his own side of the cause, although he may have shown it to the witness and have cross-examined him upon it. *Speyer v. Stern*, 2 Sweeny, 516. And if a party on cross-examination obtains proof of a document, the opposite side has no right to see the paper, for the purpose of re-examining the witness as to the paper being in the handwriting of the party whose handwriting is sworn to. If the cross-examining counsel merely produces a paper, and asks the witness whether it is in his handwriting, that does not entitle the other side to see it; but if he proceeds to found any question on the document, the opposite counsel has a right to see it; and if upon a writing being put into the witness's hand for the purpose of cross-examination, the cross-examination wholly fails, the adverse counsel is not entitled to look at the paper.

When a book is put into the hands of a witness to refresh his recollections, and questions are asked upon it on the cross-

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examination, the book is not thereby made evidence for the party producing it, and against the party cross-examining; though when a book is so produced, the party against whom it is produced may use it as evidence in his own favor. *Payne v. Ibbotson*, 3 Hurlst. & Norm. 960.

Where a witness has been examined as to entries in a book, the adverse party cannot cross-examine as to other entries which have not been used, without putting them in as evidence.

So where, upon the examination in chief of a witness, a valid objection has been taken to the admission of illegal or incompetent evidence, a cross-examination as to the same matter, by the objecting party, will not waive the previous valid objection. *Simpson v. Watrus*, 3 Hill, 619; *Worrall v. Parmelee*, 1 N. Y. (1 Comst.) 519; *Oakley v. Sears*, 2 Rob. 440; *Duff v. Lyon*, 1 E. D. Smith, 536.

A court has power to restrain an abuse of the right of cross-examination, and to prevent an improper or vexatious delay in the progress of a trial; and where a party attempts, by frivolous and impertinent inquiries, to retard the course of justice, and needlessly occupy time, the court may correct the abuse by refusing to permit the party to continue the examination. It is the duty of the court to exercise that power, whenever the ends of justice clearly require its interposition. But it should be exercised only in such cases. *Peck v. Richmond*, 2 E. D. Smith, 380; *Plato v. Kelly*, 16 Abb. 188.

So the court in which a cause is tried may, in the exercise of its discretion, exclude, on the cross-examination, disparaging questions not relevant to the issue, though put for the avowed purpose of impairing the general credit of the witness; and this may be done on the objection of the party, without putting the witness to his claim of privilege. In the exercise of this discretion the court may allow such questions to be asked, when there is reason to believe that such course will tend to promote the ends of justice; but they may properly be excluded, when a disparaging course of examination seems unjust. *Great Western Turnpike Co. v. Loomis*, 32 N. Y. (5 Tiff.) 127; *Brandon v. People*, 42 N. Y. (3 Hand) 266; *Greton v. Smith*, 33 N. Y. (6 Tiff.) 245; *La Beau v. People* 34 N. Y. (7 Tiff.) 223.

The time when a witness shall be cross-examined is also in the discretion of the court. It is usually done immediately after the examination in chief is closed; but it may be delayed by the

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court to any stage of the cause before the cause is finally submitted. There ought, however, to be some good cause shown before the ordinary course is abandoned, and the exceptional practice adopted. The general rule is, that the court will require counsel to avail themselves of the opportunity of a cross-examination before the witness leaves the stand, unless for some good reason the court should allow them the privilege, at a subsequent stage of the trial. *Sheffield v. Rochester & Syracuse R. R. Co.*, 21 Barb. 339. So where a witness has been examined and cross-examined by the several counsel of the parties, it is within the discretion of the court to allow or refuse to allow the witness to be recalled by the cross-examining counsel, for the purpose of laying a foundation for his impeachment. *Romertze v. East River National Bank*, 2 Sweeny, 82. For the purpose of laying a foundation to impeach a witness, it is the duty of the impeaching party to interrogate him; that is, call his attention to the subject, and that must be done upon his cross-examination, and cannot afterward be done except by the permission of the court in the exercise of its discretion. The rule which requires an examination in chief to exhaust a witness is equally applicable to a cross-examination. *Ib.*

It has been held by the old court of errors that if a witness has been examined in chief by one party, and dies before his cross-examination, the evidence taken on the direct examination cannot be rejected, but is to be taken as a part of the evidence in the cause. *Forrest v. Kissam*, 7 Hill, 463. This decision cannot, however, be regarded as authority in the light of more recent decisions. The rule has been laid down by the court of appeals, that where a witness has been examined in chief by one party, and the adverse party has been deprived of his right of cross-examination by the sudden illness or death of the witness, or other cause, without the fault of, or beyond the control of, the cross-examining party, the evidence given on the direct examination must be struck out, and that it is error to suffer it to go to the jury. *The People v. Cole*, 43 N. Y. (4 Hand) 508; affirming S. C., 2 Lans. 370.

So, in all cases, where the opportunity to cross-examine is lost by reason of the misconduct or fault of the witness, or of the party calling him, his evidence will be struck out. *Forrest v. Kissam*, 7 Hill, 463.

Re-examination — Impeaching witness.

m. Re-examination. After a witness has been cross-examined he may be re-examined by the party who called him ; and upon such re-examination he may be examined as to all matters upon which he has been cross-examined, thus giving him an opportunity for explaining any new facts which have thus come out. Counsel have a right, on such re-examination, to ask all such questions as may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they are in themselves doubtful ; and also to ascertain the motive by which the witness was induced to use those expressions. But he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. Thus, where the cross-examination of a witness is limited to a particular subject of a conversation had by him, the re-examination will be limited to the matter inquired about on the cross-examination, and the whole conversation cannot be required. *Greaton v. Smith*, 1 Daly, 380 ; S. C. affirmed, 33 N. Y. (6 Tiff.) 245. See *Union Bank v. Mott*, 39 Barb. 180.

As has already been stated a witness cannot obtrude evidence on cross-examination which he could not have been permitted to give on an examination in chief ; but if counsel voluntarily cross-examine as to inadmissible matter, the opposite counsel is entitled to re-examine upon it. *Blewett v. Tregonning*, 3 Ad. & Ell. 554 ; *Greville v. Chapman*, 5 Ad. & Ell. N. S. 731.

m. Impeaching witness. There are several modes of impeaching witnesses, each of which will be briefly noticed in its order. And first it may be premised generally that the credit of a witness may be impeached either by cross-examination, or by general evidence affecting his credit, or by evidence that he has before said or done that which is inconsistent with his evidence on the trial ; or, lastly, by contrary evidence as to the facts themselves.

There are numerous matters as to which a witness may be cross-examined for the purpose of impeaching his credit. But there are limits beyond which a party is not permitted to go ; and, therefore, on cross-examination, a witness cannot be examined as to what he has said at other times in relation to a fact at issue in the action, where he has not been examined as to such fact by the party calling him ; and the matters inquired about

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are not such as could legally affect his credibility. *Bearss v. Copley*, 10 N. Y. (6 Seld.) 93.

In cross-examining a witness, for the purpose of affecting his credit, courts are usually quite liberal toward the cross-examining counsel. But where the sole object of the cross-examination is the impeachment of the witness, and the matters inquired about are collateral and not pertinent to the matters in issue, the extent to which such cross-examination shall extend is entirely discretionary with the court. *Allen v. Bodine*, 6 Barb. 383; *La Beau v. People*, 34 N. Y. (7 Tiff.) 223; *Real v. People*, 42 N. Y. (3 Hand) 270. And it is in the discretion of the court to interpose and protect a witness against any inquiries not relevant to the issues to be tried, and having no object in view but the impeachment of the witness. *Great Western Turnpike Co. v. Loomis*, 32 N. Y. (5 Tiff.) 127; *Varona v. Socarras*, 8 Abb. 302.

And the rule is conclusively settled that a witness cannot be cross-examined as to any fact or matter which is collateral or irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, with the intent thereby to discredit his testimony. *Plato v. Reynolds*, 27 N. Y. (13 Smith) 586; *Gandolfo v. Appleton*, 40 N. Y. (1 Hand) 533; *Nation v. People*, 6 Park. Cr. 258.

It is also well settled that the credit of a witness can be impeached by evidence as to general character only, and not by evidence as to particular facts not relevant to the issue, for this would cause the inquiry, which ought to be simple and confined to the matters in issue, to branch out into an indefinite number of issues. *Newcomb v. Griswold*, 24 N. Y. (10 Smith) 298; *Real v. People*, 42 N. Y. (3 Hand) 270; *Corning v. Corning*, 6 N. Y. (2 Seld.) 97; *Jackson v. Lewis*, 13 Johns. 504.

The characters, not only of the witnesses in the principal cause, but of every one of the impeaching collateral witnesses, might be impeached by separate charges, and loaded with such an accumulated burden of collateral proof that the administration of justice would become impracticable. Besides this, no man could come prepared to defend himself against charges which might thus be brought against him without previous notice; and, though every man may be supposed capable of defending his general character, he cannot be prepared to defend himself against particular charges, of which he has had no notice.

Before one witness is permitted to speak of the general char-

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acter of another, it must be proved that the former has a proper knowledge of that character.

In one case (*Curtis v. Fay*, 37 Barb. 64) the plaintiff called a witness, named Pritchard, to speak of the character of a witness named Jones. Pritchard did not, of himself, know any thing about Jones' reputation. All he could testify on the subject of reputation was what some person at Genoa, whom he did not know, told him it was. This was held to be insufficient, and the court said: "An impeaching or sustaining witness is not to speak of the reputation unless he knows it, and such knowledge must be founded upon an acquaintance and intercourse with the neighbors and acquaintances of the individual whose character is in question, and that intercourse must be of some length of time, sufficient at least to enable him to gather the general estimation in which he is held in the community where he resides."

The character of a witness may be impeached by persons in whose neighborhood the attacked witness had resided until within four years prior to the trial, notwithstanding such witness had then removed to a place fourteen miles distant from that neighborhood, where he had since resided, and the impeaching witnesses did not know the character borne by the attacked witness at the latter place. *Sleeper v. Van Middlesworth*, 4 Denio, 431. The character of a witness may also be impeached by witnesses who have known the party impeached in former years, but have known nothing of him for eight or ten years prior to the trial. *Graham v. Chrystal*, 2 Keyes, 21; S. C., 37 How. 279. The principle that the existence of a person, a personal relation, or state of things, once established by proof, is presumed to continue the same until the contrary is shown, applies within reasonable limits to the character of a witness proved to have once sustained a bad reputation for truth and veracity. *Sleeper v. Van Middlesworth*, 4 Denio, 431; *Graham v. Chrystal*, 2 Keyes, 21; S. C., 37 How. 279; *People v. Haynes*, 38 id. 369; S. C., 55 Barb. 450. The law does not presume that a person of mature age, whose general character has been notoriously bad up to within a recent period, has reformed so as to have acquired an unimpeachable reputation since that time. Reformation may be shown in answer to the attack, but the law will not presume it in advance. *Rathbun v. Ross*, 46 Barb. 127. Slight acquaintance at any remote period of time will not be sufficient on the part of a sustaining witness to counteract the effect of evidence

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thoroughly impeaching a witness. *Wilmot v. Richardson*, 6 Duer, 328.

The proper inquiry as to the character of the witness must be as to his general reputation where he is best known. It is not enough that the impeaching or the sustaining witnesses can state what "others say," for those others may be few in number, and their acquaintance with the witness may be extremely limited. Ordinarily, the impeaching or sustaining witness ought to come from the neighborhood of the person whose character is in question.

A person is not permitted to manufacture evidence for the purpose of impeaching witnesses. Thus, where a person visits a distant town in which he is unacquainted, for the purpose of ascertaining the character of a witness, and for the purpose of subpoenaing impeaching witnesses against him, he will not be permitted to testify as to the result of his inquiries, nor to give his views as to the character of the witness whose credit is in question. *Douglass v. Tousey*, 2 Wend. 352.

In the impeachment of witnesses, it is general character alone that is in question; and, therefore, specific acts of immorality on the part of a witness cannot be given in evidence to impair his credibility. *Corning v. Corning*, 6 N. Y. (2 Seld.) 97; *Lee v. Chadsey*, 2 Keyes, 543; S. C., 3 id. 225; *La Beau v. People*, 6 Park. Cr. 371; *Varona v. Socarras*, 8 Abb. 302; *Greaton v. Smith*, 1 Daly, 380.

Petit larceny is not a felony, and, therefore, a conviction for that offense does not destroy the competency of a witness; but the record of conviction may be introduced for the purpose of affecting the credit of a witness who has been convicted of that offense. *Carpenter v. Nixon*, 5 Hill, 260; *Shay v. People*, 22 N. Y. (8 Smith) 317; *People v. Rawson*, 61 Barb. 619.

Interest does not render a witness incompetent, but it may affect his credit, and, therefore, it may be shown by a witness, on cross-examination, that he is the real party in interest, and that a transfer of his interest to the plaintiff was a mere sham. *Hoyt v. Lynch*, 2 Sandf. 328. When a party to the action is a witness, he may be impeached in the same manner as any other witness. *Varona v. Socarras*, 8 Abb. 302. See *Central National Bank of New York v. Arthur*, 2 Sweeny, 194.

It has been held, that merely proving that the general character of a witness is bad is not enough to effectually impeach

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him, when the impeaching witness is not asked whether he would believe the other witness on oath. *Gilbert v. Sheldon*, 13 Barb. 623. To show general bad character is immaterial; the party must go further and prove that the character of the witness is bad as to truth and veracity, or must show, by the impeaching witness, that he would not believe the other on oath. *Gilbert v. Sheldon*, 13 Barb. 623. In the case last cited, it was not even shown that the general moral character of the witness was bad.

But in a subsequent case it has been held that after impeaching witnesses are shown to be acquainted with the general moral character of the person whose credit is assailed, and they declare it to be bad, the question of credit is then for the jury, under proper comments from the court, without any inquiry of the discrediting witnesses as to whether they would believe him under oath. *Wright v. Paige*, 36 Barb. 438; S. C. affirmed, 3 Keyes, 581; 3 Trans. App. 134.

The almost invariable practice, however, of asking the impeaching witness whether he would believe the other on oath, is not to be disregarded in practice, and a neglect or refusal to put the question implies a doubt whether the impeaching witness would declare against the credit of the witness, so far as to swear that he was not to be believed under oath. In these cases "the true object to be effected is, to prove the witness's general character *for truth* to be bad. His general character in other respects is of no consequence. All experience shows, that the general characters of many men are bad, in the common acceptation of the word, while their veracity is unimpeachable. Indeed, most men term that man's general character bad who has some one cardinal vice, although in other respects he may be irreproachable. In short, proof of general bad character, as that term is generally understood and used in society, does not *necessarily* and legally prove the fact that the witness's character for veracity is bad; and, therefore, it is immaterial evidence where the party avows his intention to stop with that question. All the elementary writers, in their formula of queries to the impeaching witness, indicate most clearly and decidedly, that further questions must be put in order to render the impeachment effectual." Per SHANKLAND, J., in *Gilbert v. Sheldon*, 13 Barb. 626, 627. See *Wright v. Paige*, 3 Keyes, 531; S. C., 3 Trans. App. 134. And it is proper to remark here, that where it is sought to impeach a witness on account of his bad character, and the wit-

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nesses are called for that purpose, who testify that they are acquainted with the *general character* of the witness whose credit is in question, they may be asked whether they would believe him on oath notwithstanding they disclaim all knowledge of the character of the witness *for truth and veracity*. *Johnson v. People*, 3 Hill, 178. See *Hume v. Scott*, 3 A. K. Marsh. 260.

Where it is sought to impeach a witness on the ground that he has made statements, out of court, which are contrary to what he has sworn on the trial, such proof may be made by any competent witness who heard his previous statements. And where such previous statements were made on oath as a witness, any person who was present in court, and heard the testimony of the witness, is as competent to testify what he swore to as the judge who presided at the trial, or as counsel who took minutes of the evidence. *Grimm v. Hamel*, 2 Hilt. 434; *Tooker v. Gormer*, id. 71. Written notes or minutes of the evidence may be more reliable, and, therefore, a jury or court might attach more credit to them than to a statement from mere memory, if any conflict existed between them. But before the written or printed statement of testimony taken on a former trial can be read in evidence, it must be proved that the paper to be read from contains a correct and true minute of the evidence. *Oakley v. Sears*, 2 Rob. 440.

Although it appears that a witness has sworn differently upon the same point on a former occasion, he is not to be pronounced incompetent by the judge, and his evidence stricken out and wholly excluded from consideration, as though he had been convicted of a crime, rendering him incompetent to testify as a witness; but his testimony must remain in the case, to be considered by the jury, in connection with the other evidence, under such prudential instructions as may be given by the court, and subject to the determination of the court having jurisdiction to grant new trials in cases of verdicts against evidence. *Dunn v. People*, 29 N. Y. (2 Tiff.) 523; *Warren v. Haight*, 62 Barb. 490. See *Lee v. Chadsey*, 2 Keyes, 543; S. C., 3 id. 225; *Ynguanzo v. Salomon*, 3 Daly, 153.

A witness, or a party who is a witness, is not bound to state what he swore to on a former trial, since his statements might be used against him, in a prosecution for perjury, if there was a contradiction between the two statements. *Pickard v. Collins*, 23 Barb. 444. So, if the witness has made a contradictory state-

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ment in writing, as, for instance, in a letter, it may be used for the purpose of contradicting him.

On the subject of relevancy, it has been long settled, that a witness may be asked whether, on some former occasions, he has not given a different and contradictory representation of the same subject.

If the witness answers in the affirmative, the question and its answer of course affects his credit, whether the subject-matter of the answer be relevant or irrelevant to the matters in issue; if he answers in the negative, and the subject of the answer be irrelevant to the matters in issue, the answer is conclusive, and evidence cannot be given to contradict the witness; but if the subject of the answer be relevant to the matters in issue, then evidence may be given to show that the witness has on a former occasion given a different representation of the subject; and the inquiry is made in order to lay a foundation for proof of contradictory statements. *Carpenter v. Ward*, 30 N. Y. (3 Tiff.) 243; *Sloan v. N. Y. Central R. R. Co.*, 45 N. Y. (6 Hand) 125; *Patchin v. Astor Mutual Ins. Co.*, 13 N. Y. (3 Kern.) 268; *Gandolfo v. Appleton*, 40 N. Y. (1 Hand) 533.

To entitle the examining counsel to show a discrepancy between a statement made by the witness on a former trial, and another made on the present trial, for the purpose of impeaching the credibility of the witness, it must appear that the testimony related to a point *material* to the issue on trial, or to a fact brought out on the examination of the adverse counsel. *Carpenter v. Ward*, 30 N. Y. (3 Tiff.) 243. And where it is desired to impeach a witness by proving that he has made statements out of court in conflict with his evidence in court upon a material question in the case, it is necessary, in order to lay the foundation for contradiction, to ask the witness specifically whether he has made such statements. *Sloan v. New York Central R. R. Co.*, 45 N. Y. (6 Hand) 125. The usual and most accurate mode of examining the contradicting witness is to ask the precise question put to the principal witness. Otherwise, hearsay evidence, not strictly contradictory, might be introduced to the injury of the parties, and in violation of legal rules. The practice upon this subject must be to some extent under the control and discretion of the court. It is important that the jury should understand that such evidence is collateral and not evidence in chief; and the witness sought thus to be impeached should have

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an opportunity of making explanation, in order that it may be seen whether there is a serious conflict, or only a misunderstanding or misrepresentation; and for the purpose of eliciting the real truth the court may vary the strict course of examination. *Ib.*

Where a witness has made a written sworn statement of facts, which contradicts what he has since sworn to as a witness on a trial, such sworn statement may be put in evidence to contradict his evidence and to impeach him, without first calling his attention to such statement, and interrogating him in relation to it. *Clapp v. Wilson*, 5 Denio, 285; *Romertze v. East River National Bank*, 49 N. Y. (4 Sick.) 577.

The written instruments thus introduced to impeach a witness are not made evidence by merely producing them and proving their execution; but to render them evidence in the cause they must be read, or the reading must be expressly or impliedly waived. *Clapp v. Wilson*, 5 Denio, 285.

It is only where a witness has stated *facts* differently from what he swears that he can be contradicted; and, therefore, it is not competent to show that a witness has previously expressed an *opinion* contradictory to his present opinion or statement. *Holmes v. Anderson*, 18 Barb. 420; *Elton v. Larkins*, 5 Carr. & Payne, 385. This rule, however, does not seem to be without exceptions. See *Patchin v. Astor Mutual Ins. Co.*, 13 N. Y. (3 Kern.) 268.

If, on being interrogated, the witness admits that he has made statements contrary to what he has just sworn, proof on the other side becomes unnecessary, and an opportunity is afforded to the witness of giving such reasons, explanations or exculpations of his conduct, if there be any, as the circumstances may furnish; but, if the witness denies the making of the statement, and the matter is not collateral to the cause, witnesses may be called to contradict him. But it is not enough in such a case to ask the witness the general question whether he has ever said so and so. He must be asked as to the time, place and person involved in the supposed contradiction, or some other circumstance sufficient to point out the particular occasion. *Pendleton v. Empire Stone Dressing Co.*, 19 N. Y. (5 Smith) 13; *Budlong v. Van Nostrand*, 24 Barb. 25; *Sprague v. Cadwell*, 12 id. 516; *Palmer v. Haight*, 2 id. 210.

If the witness neither directly denies nor admits the act or

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declaration, as when he merely says he does not recollect ; or if he gives any other indirect answer not amounting to an admission, it is competent for the adverse party to prove the affirmative, for otherwise the witness might, in every such case, exclude evidence of what he had said or done, by answering that he did not remember.

If the witness declines to answer on account of the tendency of the question to criminate him, the adverse party is still at liberty to adduce the same proof. And the possibility that the witness may, on that ground, decline to answer, affords no sufficient reason for not giving him the opportunity of answering, with a view to explain the circumstances and to exculpate himself.

So strict is the rule in relation to the examination of a witness, as to contradictory statements, that a witness whose testimony has been taken conditionally cannot be impeached on the trial by proving that, subsequent to such conditional examination, he had made statements inconsistent with his testimony, or had said that what he had sworn to was false. Before such evidence can be given the witness must be interrogated in relation to it. *Stacy v. Graham*, 14 N. Y. (4 Kern.) 492. See *Romertze v. East River National Bank*, 2 Sweeny, 82. And, if a court allows a witness to be impeached by such a contradiction, before he has been interrogated, it will be error, and the error will not be cured by afterward recalling the witness and permitting him to explain his testimony. *Sprague v. Cadwell*, 12 Barb. 516. Such an explanation would not, or at least might not, in all cases reinstate the witness to the same standing with the jury as he would have in case he had been permitted to make the explanation before being contradicted. An explanation made afterward might be said to be forced from the witness which otherwise would appear to be frank and ingenuous.

The party intending to impeach a witness by showing statements made by him, inconsistent with his testimony on the examination in chief, should be careful to lay the proper foundation therefor on the cross-examination, as, after the witness has left the stand, it will be entirely within the discretion of the court to permit, or refuse to permit, the cross-examining counsel to recall the witness for this purpose. *Romertze v. East River National Bank*, 2 Sweeny, 82.

It is always competent to show that a witness is hostile to the

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party against whom he is called ; that he has threatened revenge, or that a quarrel exists between them. A jury would scrutinize more closely and doubtingly the evidence of a hostile than that of an indifferent or a friendly witness. Hence, it is always competent to show the relations which exist between the party against as well as the one for whom he is called. *Starks v. People*, 5 Denio, 108 ; *Bemis v. Kyle*, 5 Abb. N. S. 232 ; *Newton v. Harris*, 6 N. Y. (2 Seld.) 345. But, where the cross-examining party attempts to show that the witness is giving his testimony under some feeling or impulse inconsistent with an impartial disclosure of the truth, he should show that fact only, and not inquire after the particular process, or the detail of the circumstances by means of which that feeling may have been produced. *Boynton v. Boynton*, 43 How. 380. The fact itself is all that the case can require to be proved, and all that the law will permit to be shown. The discovery of the motive under which the witness may be giving his evidence is the end and object to be attained ; and this can always be accomplished by the direct inquiry concerning its existence or concerning the facts themselves, if they are such as ordinarily indicate the existence of improper motives. *Ib.*

A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination or by the testimony of other witnesses ; but if the character of the witness has been impeached, although upon cross-examination only, evidence on the other side may be given to support the character of the witness by general evidence of good conduct.

It is a general rule that a party will not be permitted to give evidence of his witness's good character until it has been attacked on the other side, either by the evidence of witnesses called for such purpose, or by the evidence of the witnesses on cross-examination going to impeach his general character. *People v. Gay*, 7 N. Y. (3 Seld.) 378 ; S. C., 1 Park. 308 ; *Bracy v. Kibbe*, 31 Barb. 273 ; *Frost v. McCargar*, 29 *id.* 617 ; *Hannah v. McKellip*, 49 *id.* 342.

Evidence which merely goes to show that the account given by a witness is improbable, or to show that the witness had made declarations hostile to the party against whom he was called, does not amount to an attack upon general character, which will authorize the party to call witnesses, to show the general charac-

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ter of the attacked witness to be good. *Starks v. People* 5 Denio, 106. See *People v. Hulse*, 3 Hill, 309; *Leonori v. Bishop*, 4 Duer, 420. Thus where the veracity of a witness is attacked, and he is sought to be impeached only by proof of contradictory statements made by him on other occasions, in respect to the same matter, or by proof of particular facts stated by such witness against himself, on his examination, evidence of his general good character, or of good character for truth and veracity, is incompetent for the purpose of supporting the witness. *Frost v. McCargar*, 29 Barb. 617.

But, where the cross-examination of a witness is conducted in a manner which tends to impair his credibility, by showing that a certain prosecution was the result of a conspiracy in which the witness was concerned, it is competent for the party to sustain his witness by evidence corroborating his statements and vindicating his motives. *Lohman v. People*, 1 N. Y. (1 Comst.) 380.

Evidence which is given for the purpose of sustaining the character of a witness should be as to his character for truth and veracity, and not to his honesty. *Gurney v. Kenny*, 2 E. D. Smith, 132. And an opinion that a witness is honest can have little weight against his own testimony, that he had committed numberless larcenies. *Ib.* And after the credit of a witness has been impeached by the production of a record of his conviction for the crime of larceny, it is not competent for the party calling him to give evidence explanatory of the conviction, and in favor of the innocence of the witness notwithstanding the conviction. *Gardner v. Bartholomew*, 40 Barb. 325. But, where the cross-examination of a witness tends to impeach his credibility, it is competent for the party calling him, to sustain him by giving in evidence letters of the adverse party, which tend to show that the witness is worthy of credit. *Stacy v. Graham*, 14 N. Y. (4 Kern.) 492.

Where an attempt is made to impeach a witness, by showing a bias on his part toward the party calling him, on account of relationship, it is competent for such party to show that he and the witnesses are at variance, and not on good terms. *Clapp v. Wilson*, 5 Denio, 285.

It is no corroboration of the testimony of a witness, to show that he has previously made declarations out of court corresponding with evidence given by him on the trial, and, therefore.

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such declarations ought not to be received in evidence. *Dudley v. Bolles*, 24 Wend. 465; *Smith v. Stickney*, 17 Barb. 489. And this is the rule, even when an attempt has been made to impeach the witness by showing that he has made contradictory statements out of court. *Ib.* When the character of a witness is impeached by general evidence, the party who called the witness is at liberty to examine the impeaching witnesses as to the grounds of their belief. And the impeaching witnesses may themselves be impeached in the same manner as any other witness.

The foregoing rules relate exclusively to the impeachment of witnesses called by the adverse party. It is now proposed to inquire whether a party can be allowed to produce evidence for the purpose of disproving or impeaching the testimony of his own witnesses, although such evidence should have the effect of throwing discredit upon the witnesses.

It is clear that a party is not to be sacrificed to his witness; he is not represented by him, nor ought he to be identified with him, or bound by all he may say. On the other hand, a party ought to be placed under such restrictions as may be necessary for preventing unfair or dishonest practice. If a party produces a witness, knowing him at the time to be a man of infamous character, and that witness, in giving evidence, disappoints or deceives him, he ought not to be allowed to prove his infamy for the purpose of destroying the effect of his evidence. Knowing the infamy of his character, he had more reason to suspect and disbelieve, than to trust him; nor has he any just ground to complain that his cause is prejudiced by false evidence, as he could expect nothing less from such a witness; and he suffers not unjustly for using a witness whom he knew to be infamous.

But if a party not acting a dishonest part is deceived by his witness; or, if a witness professing himself a friend, turns out an enemy, and after promising proof of one kind gives evidence directly contrary, is the party to be restrained from laying the true state of the case before the court?

The common sense of mankind might be expected to answer this proposition in the negative, and to decide that the true state of the case should be made known. Further, if a witness, whether from mistake, from ignorance, or from design, gives evidence unfavorable to the party who calls him, is the party to be restrained from calling other witnesses to prove facts different

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from those which he has represented ? All must agree that such proof of a different state of facts ought to be allowed.

But, in the first place, it is to be remembered that it is an established rule, that a party shall never be permitted to produce general evidence to discredit his own witness ; for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him.

The meaning of the rule is, that a party, after producing a witness, cannot prove him to be of such general bad character as would render him unworthy of credit. *Thompson v. Blanchard*, 4 N. Y. (4 Comst.) 303 ; *Williams v. Sargeant*, 46 N. Y. (1 Sick.) 481. Nor can the party producing a witness be permitted to prove that such witness has at another time made declarations or statements contradictory to the statements to which he testified, for the purpose of affecting his credibility as a witness. *Ib.*

If either party to an action calls his adversary as a witness, he will be bound by the same rules which apply to other witnesses ; and he cannot impeach the general character of such witness, nor show that he has made contradictory statements. *Pickard v. Collins*, 23 Barb. 444. See *Berner v. Mitnacht*, 2 Sweeny, 582 ; *Central National Bank of City of New York v. Arthur*, *id.* 194.

The cross-examination of a witness does not, as a general rule, make him the witness of the cross-examining party, so as to prevent him from impeaching the witness. And where a witness for the plaintiff was cross-examined by the defendant and the cross-examination suspended, and then renewed after the plaintiff had rested, and he was then re-examined by the plaintiff, and then cross-examined by the defendant, this was held not to preclude the defendant from impeaching the general character of the witness, and from showing that he had made contradictory statements. *Mattice v. Allen*, 33 Barb. 543. See *People v. Moore*, 15 Wend. 419. But, if the cross-examination relates to entirely new matter ; or, if the party entitled to cross-examine a witness calls him subsequently to prove new matter on his own side, it may be that he will so far make the witness his own as not to be permitted to impeach his general character. *Ib.*

When, however, a party is under the necessity of calling a witness for the purpose of satisfying the formal proof which the

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law in some cases requires, he is not precluded from impeaching such a witness. And, for that reason, a party may impeach a subscribing witness, whom he has been compelled to introduce as a witness. *Dennett v. Dow*, 5 Shepley, 19; *Shorey v. Hussey*, 32 Me. 579. See *Greenough v. Eccles*, 5 C. B. (J. Scott) N. S. 807, note, and cases cited.

And when a witness, by surprise, gives evidence against the party who called him, that party will not be precluded from proving his case by other witnesses; for it would be contrary to justice that the treachery of a witness should exclude a party from establishing the truth by the aid of other testimony. When a party is thus surprised by the statements of his own witness and he calls other witnesses to contradict him as to particular facts, it does not follow from necessity that the whole of the evidence of the contradicted witness is to be rejected. The whole matter is a question for the jury. *Bradley v. Ricardo*, 8 Bing. 57.

And, although a party may not impeach or assail the credibility of his own witness by general evidence, or by showing that he had previously made statements inconsistent with his testimony, he may prove on the merits, by independent testimony, the truth of a particular fact in direct contradiction to the testimony of the witness. *Thompson v. Blanchard*, 4 N. Y. (4 Comst.) 303; *Williams v. Sargeant*, 46 N. Y. (1 Sick.) 481. If the testimony offered is material, and goes to the very facts in issue, it is competent, although it should contradict every other witness whom the party has examined. The rule prohibits a contradiction which is attempted for the mere purpose of impeachment of the party's own witness, or where the matter sought to be contradicted is collateral only, and not going to the issue. *Parsons v. Suydam*, 3 E. D. Smith, 276; *Pickard v. Collins*, 23 Barb. 444.

A party calling a witness is not bound by his testimony in all its parts. He may, if he is able, satisfy the court or jury, from the facts and circumstances stated by the witness himself, that the witness is mistaken in some of his statements or conclusions, while he is correct in others. *Keutgen v. Parks*, 2 Sandf. 60. When a witness is cross-examined as to collateral matters, for the purpose of affecting his credit, his answers in relation to such matters are conclusive. But when the questions relate to matters which are material to the issues, his answers are not conclusive even though the evidence came out on cross-examination,

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and he may be contradicted by other witnesses. *Mills v. Carnly*, 1 Bosw. 160.

The court has a discretion as to the number of witnesses to be called for the purpose of impeaching a witness, and will limit the number to meet the requirement of every case, should either party persist in wasting the time of the court by the examination of an unreasonable number of impeaching witnesses. *Green v. Brown*, 3 Barb. 119; *Nolton v. Moses*, id. 31.

o. Committing perjured witness. It is provided by statute that whenever it shall appear to any court of record, or to any surrogate, that any witness or party who has been legally sworn and examined, in any cause, matter or proceeding pending before such court or surrogate, has testified in such a manner as to induce a reasonable presumption that he has willfully and corruptly testified falsely to some material point or matter, such court or surrogate may immediately commit such party or witness, by an order or process for that purpose, to prison, or take recognizance with sureties, for his appearing and answering to an indictment for perjury. Laws of 1867, ch. 782, § 5.

Section 18. Proceedings where defect of parties.

a. In general. The Code declares that the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but, when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. And when, in an action for real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment. Code, § 122.

A defendant may waive his right to have other parties brought in, by not demurring to the complaint, if the defect of parties was apparent upon its face; or by not taking the objection by answer, if the defect was known to him but did not so appear. But, although the defect of parties appears upon the face of the complaint, and the defendants fail to demur or raise the objection in their answer, the Code makes it the imperative duty of the court to cause the proper parties to be brought in whenever it appears that a complete determination of the controversy cannot be had without the presence of such other parties. *Shaver*

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v. *Brainard*, 29 Barb. 25; *Powell v. Finch*, 5 Duer, 666; *Davis v. Mayor, etc., of New York*, 2 id. 663.

The cases in which "a complete determination of the controversy cannot be had without the presence of other parties," are where there are persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined. There may be many other cases in which a defendant may require other parties to be brought in, so that the judgment of the court in the action may protect him against the claims of such other parties; but this is his own privilege, and he may waive it. *McMahon v. Harrison*, 12 How. 39.

b. Of plaintiffs. If the complaint shows upon its face that there is a defect of parties plaintiff, and the defendant has omitted to demur, or if the defect is not apparent upon the face of the complaint, and the defendant has failed to set it up in his answer, the Code still makes it necessary for the court to cause the proper parties to be brought in, if the rights of the necessary parties cannot be saved in rendering final judgment. In other cases the defendant may be deemed to have waived the objection by failing to raise it by answer or demurrer. *Shaver v. Brainard*, 29 Barb. 25. If, however, the objection was raised by answer or demurrer, the complaint should, as a general rule, be dismissed. The court may, however, in its discretion, either allow the cause to stand over for the purpose of allowing the plaintiff to bring in the proper parties, upon payment of costs, or may dismiss the complaint. *Van Epps v. Van Deusen*, 4 Paige, 64. If the defendant does not set up the objection in his pleadings, the complaint should not, as a general rule, be dismissed; but, on the contrary, the plaintiff should be allowed a reasonable time in which to bring in the proper parties, unless such parties were willfully or fraudulently omitted. *Van Epps v. Van Deusen*, 4 Paige, 64; *Davis v. Mayor, etc., of New York*, 2 Duer, 663; *Vanderwerker v. Vanderwerker*, 7 Barb. 221; *Loeschigk v. Addison*, 7 Rob. 506; *O'Brien v. Heeney*, 2 Edw. Ch. 242.

c. Of defendants. The general rules above stated are equally applicable to proceedings on the omission of the plaintiff to make all necessary parties defendants.

The court will not, however, allow the plaintiff to bring in a new party defendant when the presence of such party is the sole condition necessary to his right of recovery. *McMahon v.*

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Allen, 12 How. 39. Nor will the court order new parties defendant to be brought in against the will of the plaintiff, unless their presence is necessary to the determination of the action. *Sawyer v. Chambers*, 11 Abb. 110.

But when an amendment of the complaint is ordered, the plaintiff must either procure the voluntary appearance of the omitted defendants, or must serve them with an amended summons and complaint. All the other defendants must be likewise served, and they may thereupon put in a new answer to the amended complaint. *Akin v. Albany Northern Railroad Co.*, 14 How. 337.

d. Bringing in third parties. The Code provides, that when, in an action for the recovery of real or personal property, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by a proper amendment. Code, § 122.

This provision of the Code applies only to actions for the recovery of real or specific personal property and does not apply to actions for the recovery of money. *Kelsey v. Murray*, 28 How. 243; S. C., 18 Abb. 294; *Judd v. Young*, 7 How. 79; *Tallman v. Hollister*, 9 id. 508. The object of the provision is only to extend the power formerly possessed by courts of equity in this respect, to the legal actions specified; and its application is confined to the class of cases in which a bill of interpleader would have accomplished the same end. *Hornby v. Gordon*, 9 Bosw. 656. Thus, in an action brought by a vendor of goods, to recover possession of them on the ground of fraud on the part of the purchaser, third persons claiming under the purchaser, by virtue of contracts with him, and in hostility to each other, will not be granted leave to come in as parties. *Ib.* So where a partner has transferred his interest to a third party with the consent of the other partner, and the new partner has brought an action to obtain a dissolution of his partnership, an accounting and a proper application and distribution of the assets, the retiring partner cannot obtain an order directing that the complaint be so amended as to allow him to be made a party, although the new firm covenanted with him to collect and apply the assets of the old firm to the payment of its debts. *Dayton v. Wilkes*, 5 Bosw. 655. Nor can such an order be made in an action in the nature of a credi-

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tor's bill to reach a surplus in the hands of the surrogate. *Tallman v. Hollister*, 9 How. 508.

A partition suit may be deemed an action for the recovery of real property within the meaning of section 122 of the Code; and in such suit the court may order a person not a party, but having an interest in the subject, to be made a party by amendment. But where a suit in partition is instituted for the purpose of apportioning the real estate of a person deceased among his heirs and devisees, a judgment creditor of the deceased is not entitled to be made a party for the purpose of enforcing the payment of his claim out of the real estate of the deceased debtor. *Waring v. Waring*, 3 Abb. 246.

In an action for the recovery of personal property seized under an execution against a third person, the plaintiff in the execution is entitled, on applying, to be made a defendant under the provision of the Code before mentioned. *Conklin v. Bishop*, 3 Duer, 646.

The application to be made a party is usually based on a petition setting forth the nature of the action, the interest of the party applying in the subject-matter of the action, and such facts and circumstances as will tend to show a necessity for the amendment. Notice of the application should be given to both plaintiff and defendant.

The application must be made before judgment. *Carswell v. Neville*, 12 How. 445. The granting of the order is in the discretion of the court; and the application will be denied if it appears that the applicant is prosecuting a separate action, adapted to secure all the relief to which he claims to be entitled. *Scheidt v. Sturgis*, 10 Bosw. 606.

Section 19. Nonsuit.

a. In general. A nonsuit may be either voluntary or compulsory. A nonsuit is voluntary when the plaintiff, by his own act, causes a dismissal of the action; it is compulsory when the complaint is dismissed against his will, and on motion of the adverse party, or by the direction of the court on its own motion.

b. Voluntary nonsuit. If from any reason the plaintiff finds that his evidence is not sufficient to maintain his case, he may submit to a nonsuit in order that he may have an opportunity of bringing the action on again, either in another form, or when he is better prepared with evidence. A nonsuit is only a default;

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and when the plaintiff has submitted to it, he may, notwithstanding, commence another suit against the defendant for the same cause of action.

If the plaintiff desires to be nonsuited, and the defendant does not seek affirmative relief against him, he has but to absent himself when the cause is called to attain this end. Under the former practice a plaintiff might submit to a nonsuit on the coming in of the jury, even where a notice of set-off had been given, and the jury were prepared to certify a balance in favor of the defendant. *Wooster v. Burr*, 2 Wend. 295. So a plaintiff in replevin was allowed to submit to a nonsuit on the coming in of the jury as in ordinary actions. *Gale v. Hoysradt*, 1 How. 72; S. C., 7 Hill, 179. A nonsuit was obtainable in such cases by failing to appear when the jury came into court to deliver their verdict. A verdict was irregular if the plaintiff was not called by the clerk, on the coming in of the jury, before taking the verdict, and his appearance or default entered. *Ib.* This practice has, however, long been changed; and it is provided by the rules of the supreme court, that it shall not be necessary to call the plaintiff when the jury return to the bar to deliver their verdict; and that the plaintiff shall have no right to submit to a nonsuit after the jury have gone from the bar to consider of their verdict. Rule 38, Sup. Ct.

A party who has voluntarily submitted to a judgment of nonsuit, cannot appeal therefrom and obtain a reversal of the judgment. *Van Wormer v. Mayor, etc., of Albany*, 18 Wend. 169; *O'Dougherty v. Aldrich*, 5 Denio, 385; *Jackson v. Jackson*, 16 Ohio St. 163; *Wells v. Martin*, 1 id. 386.

c. Compulsory nonsuit. According to the practice of the English courts, a plaintiff cannot be nonsuited on the trial against his assent, but may insist on the cause going to the jury, and thus take his chance of a verdict. 1 Archb. Pr. 444 (12th ed.). But, according to the practice of this State, a plaintiff may be compelled to be nonsuited on the trial, where the evidence offered by him is clearly insufficient to support his action, there being then no question of fact to be decided by the jury. This power of the courts, to nonsuit the plaintiff, arises from the fact that they are judges of the law in the case, when no facts are in dispute. *Labar v. Koplin*, 4 N. Y. (4 Comst.) 547; *Pratt v. Hull*, 13 Johns. 334; *People v. Cook*, 8 N. Y. (4 Seld.) 67, 74. If the evidence will not authorize the jury to find a verdict for the plain-

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tiff, or if the court would set it aside, if so found, as contrary to evidence, it is the duty of the court to nonsuit the plaintiff. *Silliman v. Lewis*, 49 N. Y. (4 Sick.) 379; *Labar v. Koplín*, 4 N. Y. (4 Comst.) 547; *Steves v. Oswego & Syracuse R. R. Co.*, 18 N. Y. (4 Smith) 422; *Stuart v. Simpson*, 1 Wend. 376; *Smith v. Sauger*, 3 Barb. 360; *Rudd v. Davis*, 3 Hill, 287; S. C. affirmed, 7 id. 529.

But it is not enough to justify a nonsuit that a court, upon a case made, might, in the exercise of its discretion, grant a new trial. It is only where there is no evidence in law which, if believed, will sustain a verdict, that the court is called upon to nonsuit; and the evidence may be sufficient in law to sustain a verdict, although so greatly against the apparent weight of evidence as to justify the granting of a new trial. *Coll v. Sixth Avenue R. R. Co.*, 49 N. Y. (4 Sick.) 671. To justify a verdict the law requires such proof as will leave no reasonable doubt of the existence of the fact upon which it must rest. A plaintiff cannot recover upon a possibility, nor even upon a probability; and where the evidence upon the trial only tends to prove the possibility of the existence of the facts upon which the right of recovery depends, it is the duty of the court to grant a nonsuit. *Sheldon v. Hudson River R. R. Co.*, 29 Barb. 226.

A nonsuit may be granted at the trial of a cause on the testimony adduced by the defendant. *Lomer v. Meeker*, 25 N. Y. (11 Smith) 361; *Rudd v. Davis*, 3 Hill, 287; S. C. affirmed, 7 id. 529; *Jansen v. Acker*, 23 Wend. 480; *Fort v. Collins*, 21 id. 109. Thus, where, in an action upon a promissory note, the plaintiff makes a *prima facie* case, and the defendant introduces direct, positive and uncontradicted evidence establishing the defense of usury, the defendant is entitled to a nonsuit. *Lomer v. Meeker*, 25 N. Y. (11 Smith) 361. So where, in an action brought by a contractor to recover the amount due by the terms of the contract, the defendant introduces positive and uncontradicted evidence of payment, the defendant is entitled to a nonsuit. *Rudd v. Davis*, 3 Hill, 287; S. C. affirmed, 7 id. 529.

To warrant a nonsuit on the evidence of a defendant, after a plaintiff has made out a *prima facie* case, it is not necessary that the evidence should be conclusive in its character, as, for example, a record, or something amounting to absolute verity, so as to present a mere question of law. It is enough that a verdict for the plaintiff would be against clear and uncontradicted evi-

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dence, establishing a valid defense to the plaintiff's cause of action, regardless of the character of that evidence. *Ib.*

It is a general rule that, where unimpeached witnesses testify distinctly and positively to a fact, and are uncontradicted, their testimony must be credited. *Lomer v. Meeker*, 25 N. Y. (11 Smith) 361; *Newton v. Pope*, 1 Cow. 109; *Dolsen v. Arnold*, 10 How. 528. But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made; and furthermore, it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances, as well as by statements of others, contrary to his own. In such cases, courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached. *Elwood v. Western Union Telegraph Co.*, 45 N. Y. (6 Hand) 549. See *Stafford v. Leamy*, 43 How. 40. But the positive testimony of an unimpeached, uncontradicted witness cannot be disregarded by court or jury arbitrarily or capriciously; and when, by such testimony, a defendant has established a defense to the plaintiff's cause of action, it is the duty of the court, at his request, to nonsuit the plaintiff, or, what amounts to the same thing, dismiss the complaint. *Lomer v. Meeker*, 25 N. Y. (11 Smith) 361. See *Seibert v. Erie Railway Co.*, 49 Barb. 583; *McMullen v. Hoyt*, 2 Daly, 271.

But a nonsuit cannot be ordered where the facts are not clear, or depend upon conflicting testimony. In such cases the case must be submitted to the jury. *Bidwell v. Lament*, 17 How. 357; *Keller v. N. Y. Central R. R. Co.*, 24 id. 172; *Smith v. Tiffany*, 36 Barb. 23; *Bernhard v. Brunner*, 4 Bosw. 528.

A nonsuit cannot be granted on the assumption, by the court, that the plaintiff's witness is not to be believed. Whether a witness is credible or not is solely a question for the consideration of the jury. *Merritt v. Lyon*, 3 Barb. 110. In determining the propriety of a nonsuit, the court is legally bound to assume the truth of the facts which the testimony of the plaintiff legitimately conduces to prove, although their correctness be controverted by the defendant's witnesses. *Ernst v. Hudson River R. R. Co.*, 35 N. Y. (8 Tiff.) 9, 25; S. C., 3 Abb. N. S. 82;

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32 How. 61 ; *Colegrove v. N. Y. & New Haven R. R. Co.*, 20 N. Y. (6 Smith) 492.

A nonsuit will be properly denied if the evidence shows that the plaintiff is entitled to recover any thing, although it be but nominal damages. *Van Rensselaer v. Jewett*, 2 N. Y. (2 Comst.) 135. So in an action by an administrator to recover damages for the death of his intestate, a nonsuit, or a direction to find nominal damages only cannot be given merely because there is no proof of special pecuniary damage to the next of kin, resulting from the death of the deceased. *Ihl v. Forty-second Street, etc., R. R. Co.*, 47 N. Y. (2 Sick.) 317. The commencement of an action by a plaintiff under a wrong name is not a ground for a nonsuit at the trial. *Traver v. Eighth Avenue R. R. Co.*, 3 Keyes, 497 ; S. C., 3 Trans. App. 203 ; 6 Abb. N. S. 46. It has been held in the New York superior court, that a nonsuit could not be granted on the ground that the plaintiff's counsel had not stated in his opening facts sufficient to constitute a cause of action. *Stewart v. Hamilton*, 28 How. 265 ; S. C., 18 Abb. 298 ; 3 Rob. 672. But in the supreme court a nonsuit has been granted on that ground only. *Beckwith v. Whalen*, 5 Lans. 376.

Where evidence, upon which a right to recover depends, has been received, and subsequently stricken out on motion of the defendant, a nonsuit may be ordered notwithstanding such evidence. *Bryant v. Bryant*, 42 N. Y. (3 Hand) 11.

Prior to the Code, a motion for a nonsuit brought up the question, whether the proof was sufficient to support the declaration ; and if the plaintiff proved his cause as laid, the motion would be denied, for the sufficiency of the declaration could be tested only by demurrer, or by a motion in arrest of judgment. But since the Code, the defendant does not waive the objection that the complaint does not state facts sufficient to constitute a cause of action, by omitting to raise it by answer or by demurrer. He may take the objection at the trial by a motion for a nonsuit. *Abernethy v. Society of the Church of the Puritans*, 3 Daly, 1. But, while defects in the complaint may be stated as a ground for a motion for a nonsuit, yet if further testimony is given without objection, and it is sufficient to establish a cause of action, the motion will be denied. *Kern v. Towsley*, 51 Barb. 385.

A plaintiff may be nonsuited as to one cause of action, and recover as to the rest. *Packard v. Hill*, 7 Cow. 434. So he may be nonsuited as to one of several defendants, and recover as to

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the rest. *Woodburn v. Chamberlin*, 17 Barb. 446; *Jones v. Gibson*, 5 Barn. & Cress. 768. See *McMartin v. Taylor*, 2 Barb. 356; *Dominick v. Eacker*, 3 id. 18. The rule is the same where some of the co-defendants have not appeared. *Lomer v. Meeker*, 25 N. Y. (11 Smith) 361.

d. Motion for. The defendant may move for a nonsuit when the plaintiff rests, or he may give testimony and rest, and then move for a nonsuit. *Ernst v. Hudson River R. R. Co.*, 24 How. 97. A nonsuit, or, as it is often termed, a dismissal of the complaint, may be granted at the close of the evidence on both sides, or at any other time when the plaintiff admits that he has no further evidence. *People v. Cook*, 8 N. Y. (4 Seld.) 67. The motion should not, however, be made at a time when it would necessarily interrupt the orderly administration of justice in the trial of the cause, as for example, during the progress of a direct examination of a witness, as in such cases the court will deny the motion. *Winfield v. Potter*, 24 How. 446; S. C., 10 Bosw. 226.

In moving for a nonsuit the defendant should distinctly bring to the notice of the court the special grounds which he deems will justify the granting of the motion. *Castle v. Duryea*, 32 Barb. 480. This is necessary not only that the court may be able to pass intelligently on the question presented, but also that the opposite counsel may understand the real point which the defendant intends to raise. *Abernethy v. Society of the Church of the Puritans*, 3 Daly, 1; *Trustees of St. Mary's Church v. Cagger*, 6 Barb. 576. A motion for a nonsuit, founded upon the objection that the plaintiff has shown no right to recover, or upon the objection that the evidence does not entitle the plaintiff to recover under the pleadings, is too general and indefinite, and cannot be sustained. *Ib.* Formal objections will not be listened to unless distinctly made. *Castle v. Duryea*, 32 Barb. 480. And an appellate court will not consider any objection, raised by the defendant on the motion, which does not specify the defects supposed to exist. If the nonsuit is demanded on the ground of a failure of proof, and the missing links of evidence might have been supplied on the trial without difficulty, and the objection obviated if the particular defects had been pointed out, the appellate court will not review a refusal to grant a motion for a nonsuit founded on a mere general objection. *Mallory v. Travelers' Ins. Co.*, 48 N. Y. (2 Sick.) 52; *Binsse v. Wood*, 37 N. Y.

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(10 Tiff.) 526; S. C., 5 Trans. App. 42; *Shotwell v. Mali*, 38 Barb. 445; S. C. affirmed, 36 N. Y. (9 Tiff.) 200; 34 How. 338; 1 Trans. App. 96. And where the defendant states his grounds of moving for a nonsuit, and the motion is denied, he will not be entitled to have the judgment reversed because the motion ought to have been granted upon another ground not specified or brought to the attention of the court. *Abernethy v. Society of the Church of the Pilgrims*, 3 Daly, 1; *Belknap v. Sealey*, 14 N. Y. (4 Kern.) 143. See *Crooke v. Mali*, 11 Barb. 205.

In opposition to the rules above stated, it has been held by the general term of the supreme court that, where the counsel for the defendant moved for a nonsuit upon the whole case, upon the general ground that the plaintiff had not made out a cause of action, and the motion was denied, the appellate court might reverse the judgment, where it appeared that no cause of action had been made out by the plaintiff's evidence, even though no reasons or grounds for the nonsuit were stated or pointed out, and the exception was general merely, and where it was apparent that the party moving for a nonsuit had misapprehended the true grounds of his motion, and was relying upon another ground wholly untenable. *Winslow v. Bliss*, 3 Lans. 220.

A motion for nonsuit in behalf of all of several defendants will be denied, if there is evidence sufficient to charge any one of them. *Woodburn v. Chamberlin*, 17 Barb. 446.

e. The decision. It is among the primary and most important duties of the court to order a nonsuit, or to grant a new trial, whenever the evidence is not sufficient to authorize, or to sustain a verdict. When there is proof which, uncontradicted, makes out the fact upon which the recovery depends, on the one side, and there is testimony which tends to disprove its existence on the other; or, when the recovery depends upon the degree of credit to be given to the witnesses on either side, whatever may be the opinion of the judge at the trial, he should not interfere, because these are questions to which, according to the system upon which the administration of justice rests, the jury alone can respond. But, when the evidence is of such a character that the court *in banc* would be bound to set aside a verdict for the plaintiff as unsupported by the evidence, should the jury find one, it is the duty of the court to nonsuit the plaintiff. *Sheldon v. Hudson River R. R. Co.*, 29 Barb. 226; *Labar v. Koplin*, 4 N. Y. (4 Comst.) 547. It is a well-settled rule in this State, that

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the right to nonsuit implies the duty, and that a refusal by a circuit judge to nonsuit a plaintiff in a proper case is a good ground for an exception. The right and duty to nonsuit are correlative. *Lomer v. Meeker*, 25 N. Y. (11 Smith) 361; *Robinson v. McManus*, 4 Lans. 380; *Carpenter v. Smith*, 10 Barb. 663.

On the other hand, where the plaintiff is entitled to have the cause submitted to a jury and a compulsory nonsuit is ordered, the granting of the nonsuit is a good ground for an exception. *Rider v. Pond*, 19 N. Y. (5 Smith) 262. But, where the defendant moves for a nonsuit on the ground of the insufficiency of the proof, and the court improperly denies the motion, the appellate court will not disturb the verdict on the ground that the proof was insufficient when the application for the nonsuit was made, if the deficiency in the evidence was afterward supplied on the trial by either the plaintiff or the defendant. *Schenectady & Saratoga Plank Road Co. v. Thatcher*, 11 N. Y. (1 Kern.) 102; *Kent v. Harcourt*, 33 Barb. 491; *Schwerin v. McKie*, 5 Rob. 404; *Barrick v. Austin*, 21 Barb. 241; *Mayor, etc., of the City of N. Y. v. Mason*, 1 Abb. 344; S. C., 4 E. D. Smith, 142; *Colegrove v. Harlem & New Haven R. R. Co.*, 6 Duer, 382; *Colvin v. Burnet*, 2 Hill, 620.

The granting of a nonsuit is, in effect, a decision that, as a matter of law, the plaintiff has not produced evidence sufficient to sustain the cause of action. See *Scofield v. Hernandez*, 47 N. Y. (2 Sick.) 313. But, on the other hand, the mere denial of a motion for a nonsuit does not necessarily imply that the plaintiff is entitled to a verdict, but may, and most frequently does, establish simply that the evidence adduced is of such a character as to require the decision by the jury of the questions of fact involved. *Ross v. Mayor, etc., of N. Y.*, 4 Rob. 49.

In effect, a nonsuit, or what is the same thing, a judgment of dismissal of the complaint, is not a bar to another action. *Coit v. Bland*, 22 How. 2; S. C., 33 Barb. 357; 12 Abb. 462; *Wheeler v. Ruckman*, 7 Rob. 447; S. C., 35 How. 350; *Mechanics' Banking Association v. Mariposa Co.*, 7 Rob. 225.

This rule does not, however, apply to equitable actions. The dismissal of a complaint on the merits in actions for equitable relief is a bar to a second action for the same cause, and this result is not prevented by directing that it be without prejudice to a second action. *Bostwick v. Abbott*, 40 Barb. 331; S. C., 16 Abb. 417.

Section 20. Withdrawing a juror.

a. In general. During the trial, after the jury are sworn, the parties sometimes agree to withdraw a juror. This is usually done at the suggestion or upon the recommendation of the judge, in cases where it is doubtful whether the action will lie, or where the judge intimates an opinion that, under the peculiar circumstances of the case, the action should proceed no further.

The consent of the parties is not, however, essential. Courts may, in the exercise of a sound discretion, allow a juror to be withdrawn and still retain the cause upon the calendar for trial, instead of nonsuiting a plaintiff for a defect in his proof; as in case of a surprise or mistake on his part in the preparation of his cause for trial, even where the plaintiff has not been willfully misled by the defendant. *People v. Judges of New York*, 8 Cow. 127; *People v. Ellis*, 15 Wend. 371; *People v. Olcott*, 2 Johns. Cas. 301.

b. Effect of. But, unless the court orders the cause to be retained upon the calendar, the withdrawal of a juror, by consent of the parties, puts an end to the cause, although it is not a bar to a second action for the same cause. Upon the withdrawal of a juror by consent, each party has to pay his own costs. 1 Archb. Pr. (12th ed.) 408.

Section 21. Submitting specific questions.

a. In general. The Code provides that in every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or a special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. Code, § 261. The special verdict or finding must be filed with the clerk and entered upon the minutes. *Ib.*

The submission of specific questions of fact, in writing, to a jury, in addition to the issues generally, being purely a matter of discretion with the court, such questions may be withdrawn by the court from their consideration at any time, if it is done before they give their finding thereon. *Taylor v. Ketchum*, 5 Rob. 507; S. C., 35 How. 289. The submission of special questions to a jury, to be answered by them in addition to their

general verdict, being entirely a matter of discretion with the court, neither of the parties can require it as a matter of right.

If they need a finding upon special questions, they must apply to the court, in advance of the trial, for an order to that effect; and no vested right is acquired by either party to have the findings given, because the court had once so directed. And where the court has ordered the jury to pass upon special questions of fact, the rendering of a special verdict, and its reception by the court without objection, either by the judge or the parties, is good, notwithstanding the jury have failed to answer special questions. *Moss v. Priest*, 1 Rob. 632; S. C., 19 Abb. 314.

Section 22. Variance.

a. In general. It not unfrequently occurs on the trial of a cause, that there is a want of harmony between the facts alleged in the pleadings, and the facts established by the evidence on the trial. Under the old system of practice, a variance between the pleadings and the proofs might be fatal to a good cause of action, or to a valid defense. Thus when the defense of usury was pleaded to an action on a specialty, or was set up in the plea or answer to a bill in equity, the defendant was required to prove the agreement as stated; and if the proofs disclosed a usurious agreement different from that stated in the plea or answer, the defendant failed in his defense. *Vroom v. Diltmas*, 4 Paige, 526. Thus it sometimes happened that a party with a good defense of this nature, was defeated upon the trial, because the facts by which it was to be made out were imperfectly known, or inaccurately stated at the time the issue was framed. To obviate these and similar defects in the old system of practice, the Code provides that no variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits; and that whenever it shall be alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and also in what respect he has been misled. Upon such proof being made, the court is authorized to order the pleading to be amended upon such terms as shall be just. Code, § 169.

But where the variance is not material, as above provided, namely, when the party has not proved that he has been actually misled, the court may either direct the fact to be found accord-

Variance — Material variances — Immaterial variances.

ing to the evidence, or may order an immediate amendment, without costs. Code, § 170.

But if an allegation is unproved not in some particular or particulars only, but in its entire scope and meaning, it is not be deemed a case of variance, but a failure of proof. Code, § 171.

These provisions of the Code introduced a principle unknown to the former practice, namely, that of determining questions of variance not by the want of harmony between the pleadings and the proof, and thence inferring its effect upon the preparation the adverse party could make for trial, but by direct proof *aliunde*, as to whether the party was actually misled to his prejudice by the incorrect statements of the pleadings or not. *Catlin v. Gunter*, 11 N. Y. (1 Kern.) 368; S. C., 10 How. 315.

b. Material variances. As has been stated, no variance between the allegation in a pleading and the proof is material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Code, § 169.

And where a party has been misled to his prejudice by a variance between the pleadings and the proof, the variance will still be deemed immaterial, unless the party prejudiced thereby shall prove to the satisfaction of the court that he was so misled, and also in what respect. *Ib.*; *Catlin v. Gunter*, 11 N. Y. (1 Kern.) 368; S. C., 10 How. 315. The only test of the materiality of a variance is the proof furnished to the court, that the variance has actually misled him. If such proof is not furnished, the variance must be disregarded, and the pleadings may be amended to conform to the facts proved. *Chapman v. Carolin*, 3 Bosw. 456. For examples of material variance see Wait's Code, 316, note *e*.

c. Immaterial variances. Every variance between the pleadings in an action and the proof introduced on the trial must be deemed immaterial, unless it has been satisfactorily shown to have misled the adverse party to his prejudice in maintaining his action or defense, upon the merits; or, unless the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning. Code, §§ 170, 171.

For examples of immaterial variances, see Wait's Code, 315, note *d*. For examples of what are not variances but a failure of proof, see Wait's Code, 318, note *d*.

Amendment — Summing up.

d. Amendment. The Code, in declaring the practice on the discovery of variances between the pleadings and the proof on the trial, provides that, if the variance is found to be material, the court may order the pleading to be amended on such terms as may be just. Code, § 169. The amendment may be made at once, on compliance with such terms as the court may impose, or the court may direct that the party whose pleading is defective proceed with the trial, and if successful apply at chambers for leave to amend, with the same effect as if moved at the trial. *Lettman v. Ritz*, 3 Sandf. 734. Where the latter practice is adopted, the court may, on the argument of the motion, impose such terms as are deemed equitable, even to the reduction of the amount of the verdict if deemed excessive. *Ib.*

If, however, the variance is immaterial, the court may either disregard it or order an immediate amendment of the pleading, without costs. Code, § 170. For a further discussion of this subject, see "Mistakes and Amendments."

Section 23. Summing up.

a. In general. After the testimony is all in on both sides, if the defendant does not deem it advisable to move for a nonsuit on the whole case, the several counsel next proceed to sum up the cause to the jury. Unless the court otherwise direct, but one counsel on each side can sum up the cause; and no counsel will be allowed to occupy more than one hour in summing up, unless by permission of the court. Rule 37, Sup. Ct.

Not only has the court power to restrict the number of counsel who shall address the jury, and to limit the time occupied by each, but it may also withhold from the counsel the privilege of addressing the jury. Whether counsel shall address the jury is a matter resting within the sound discretion of the court. If the judge at the trial errs in the exercise of this discretion, the remedy is by motion for a new trial on a case. *People v. Cook*, 8 N. Y. (4 Seld.) 67.

The court may also compel the counsel to confine their remarks to the issues. *Mitchell v. Borden*, 8 Wend. 570; *Fry v. Bennett*, 3 Bosw. 200 (242); S. C., 9 Abb. 45; *Mitchum v. State*, 11 Ga. 615; *Bullock v. Smith*, 15 id. 395.

The power of the court to deny to counsel the privilege of addressing the jury is properly exercised when the evidence is such as to render it proper for the court to direct a verdict for either party; and the power of the court to confine the remarks

Summing up — By the defendant.

of the counsel to the issues should in all cases be exercised, where counsel on either side lose sight of the evidence and the issues, and indulge in denunciations of a party based on the assumption of facts not proved.

b. By the defendant. The party who begins on the trial is entitled to the closing address ; and it is the general rule, that the party who has the affirmative of the issue has the right to open and close the case. *Fry v. Bennett*, 28 N. Y. (1 Tiff.) 324. This is, however, in a certain sense, a mere matter of practice, to be regulated by the discretion of the court. *Ib.* When the plaintiff has the affirmative, as is most frequently the case, the counsel for the defendant should first address the jury. In summing up the cause, he should state clearly the theory of the defense, as whether it acknowledges the cause of action of the plaintiff and shows some matters in discharge, or whether it denies that the plaintiff ever had any cause of action. All the particulars of the defense should be distinctly stated, and all the circumstances attending it. The counsel should next examine the evidence introduced on either side, and clearly review the testimony of the witnesses so far as it tends to show that the plaintiff never had a cause of action ; or, if it be conceded that he had one, that it had been discharged.

How far it may be advisable to examine the character of the witnesses, the manner in which they gave their testimony, or any other circumstances which are calculated to give credence to the witnesses, or to deprive their testimony of confidence, is a matter of discretion to be determined by the circumstances of the case. The counsel should, however, carefully avoid dwelling on a weak point in the defense in anticipation of the remarks of the plaintiff thereon, because such a course will weaken rather than fortify his case.

Having thus caused the facts presented on the trial to pass in review before the minds of the jury, the counsel may apply the law to the facts in clear, concise, well-chosen language. The counsel should not only give the rule of law applicable to the facts, but may also give the reason of the rule, and show that it is founded in reason and justice.

Should the rule be one contrary to what has been popularly accepted as the one applicable to the state of facts presented, the minds of the jury should be carefully disabused of error by a proper citation, or even the reading of authorities. It is to be

Summing up — By plaintiff — Rules for.

remembered, however, that the court will lay down the rules of law for the guidance of the jury, and that counsel do not usually argue questions of law at length before the jury. See § 24 *a*, *post*, 170 to 172.

c. By plaintiff. The first duty of the plaintiff, in the closing address to the jury, should be to destroy, as far as possible, any feeling of hostility or distrust toward himself or client which may have been aroused in the minds of the jury by the address of the counsel preceding him. This is often best accomplished by a well-turned compliment to the defendant's counsel, delivered with seeming sincerity and candor, but coupled with an intimation that all the facts in the case had not been presented, and that the points of law, upon which the right of the plaintiff to a verdict depends, had been ignored or overlooked.

The counsel for the plaintiff should then distinctly state the full extent of the plaintiff's claim, and the circumstances under which it is made. He should also show how it is supported by the evidence, and the legal grounds and authorities in its favor.

The principal facts upon which the right of recovery depends should be brought prominently forward, while those which are of minor importance should be dismissed with a single comment. The facts which the defendant has inadvertently brought out in support of the plaintiff's case should not be overlooked; and the failure of the defendant to support the theory of the defense by facts, or the fact that the testimony of the defendant's witnesses has been rebutted by that of the plaintiff, should be impressed upon the mind of the jury.

The misstatements of the defendant's counsel as to facts or law should be corrected, and his omissions supplied. The rules of law should be applied to the whole case as presented, and the case submitted to the jury, with at least assumed confidence in the result.

d. Rules for. The general rules for the summing up of a cause have been aptly condensed by Judge STORY in the following lines :

" Be brief, be pointed ; let your matter stand,
 Lucid in order, solid, and at hand ;
 Spend not your words on trifles, but condense ;
 Strike with the mass of thoughts, not drops of sense ;
 Press to the close with vigor once begun,
 And leave (how hard the task!) leave off when done ;
 Who draws a labor'd length of reasoning out,

Summing up — Rules for — Questions for the court.

Puts straw in lines for winds to whirl about ;
 Who draws a tedious tale of learning o'er,
 Counts but the sands on ocean's boundless shore ;
 Victory in law is gained as battles fought,
 Not by the numbers, but the forces brought.
 What boots success in skirmish or in fray,
 If rout or ruin following, close the day ?
 What worth a hundred posts maintained with skill,
 If these all held, the foe is victor still !
 He who would win his cause, with power must frame
 Points of support, and look with steady aim ;
 Attack the weak, defend the strong with art,
 Strike but few blows, but strike them to the heart ;
 All scattered fires but end in smoke and noise,
 The scorn of men, the idle play of boys.
 Keep, then, this first great precept ever near ;
 Short be your speech, your matter strong and clear ;
 Earnest your manner, warm and rich your style,
 Severe in taste, yet full of grace the while ;
 So you may reach the loftiest highs of fame,
 And leave, when life is past, a deathless name."

Section 24. Questions for the court.

a. In general. All questions of law arising on the trial are matters to be determined by the court, while questions of fact must be determined by the jury.

When the evidence on the trial of a cause shows, as a matter of law, that the plaintiff cannot recover, the defendant is entitled as of right to a nonsuit, and it will be error to allow the case to go to the jury. *Carpenter v. Smith*, 10 Barb. 663 ; *Lomer v. Meeker*, 25 N. Y. (11 Smith) 361 ; *Labar v. Koplin*, 4 N. Y. (4 Comst.) 547 ; *Haring v. New York & Erie R. R. Co.*, 13 Barb. 9 ; *Stuart v. Simpson*, 1 Wend. 376. But it is only where there is no evidence in law which, if believed, will sustain a verdict, that the court is called upon to nonsuit. *Colt v. Sixth Avenue R. R. Co.*, 49 N. Y. (4 Sick.) 671.

When a fact not in itself, or in view of attending circumstances incredible or improbable, is positively and distinctly testified to by witnesses who are unimpeached and uncontradicted, it is error if the court submit it to the jury to find as a fact whether such evidence is true. *Robinson v. McManus*, 4 Lans. 380 ; *Lomer v. Meeker*, 25 N. Y. (11 Smith) 361 ; *Siebert v. Erie R. R. Co.*, 49 Barb. 583 ; *Elwood v. Western Union Telegraph Co.*, 45 N. Y. (6 Hand) 549 ; *Milbank v. Dennistoun*, 21 N. Y. (7 Smith) 386 ; S. C., 19 How. 126 ; *Besson v. Southard*, 10 N. Y. (6 Seld.) 236.

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When the terms and intent of a contract or instrument are fully proved, its construction, effect, sufficiency and validity are questions for the court. *Chaffee v. Cattaraugus County Mutual Ins. Co.*, 18 N. Y. (4 Smith) 376; *Stacy v. Graham*, 3 Duer, 444; *Hough v. Brown*, 19 N. Y. (5 Smith) 111; *Chapin v. Potter*, 1 Hilt. 366; *Cook v. Litchfield*, 2 Bosw. 137; S. C., 5 Sandf. 330; 10 N. Y. Leg. Obs. 330. But where the evidence in respect to its terms is conflicting or doubtful, and a question arises as to the intent of the parties, the question must be submitted to the jury under the instructions of the court. *Ib.*

The question of reasonable time or reasonable diligence is ordinarily a question of mixed law and fact. When there is a conflict of evidence, and the facts are unsettled, the jury are to decide under the instructions of the court as to the law. But where there is no dispute as to the facts, the question is purely one of law. *Roth v. Buffalo & State Line R. R. Co.*, 34 N. Y. (7 Tiff.) 548; *Witbeck v. Holland*, 45 N. Y. (6 Hand) 13; *Hedges v. Hudson River R. R. Co.*, 49 N. Y. (4 Sick.) 223; *Alexander v. Parsons*, 3 Lans. 333. See *Burnell v. N. Y. Central R. R. Co.*, 45 N. Y. (6 Hand) 184.

The question whether an act done was within the powers conferred upon an agent is a question of law for the court where there is no dispute about the agent's authority. *Coykendall v. Eaton*, 42 How. 378; *Latham v. Westervelt*, 26 Barb. 256.

Questions of negligence on controverted facts are questions for the jury, and not questions of law for the court. *Maloy v. N. Y. Central R. R. Co.*, 40 How. 274; S. C., 58 Barb. 182. But where the uncontroverted facts are such that negligence, whether contributory or otherwise, must be inferred as a matter of law, the question is for the court, and should not be submitted to the jury. *Sexton v. Zett*, 44 N. Y. (5 Hand) 430; *Bernhardt v. Rensselaer & Saratoga R. R. Co.*, 23 How. 166. See *Calkins v. Barger*, 44 Barb. 424.

Questions as to the allowance of alimony are always questions for the court. *Forrest v. Forrest*, 6 Duer, 102; S. C., 3 Abb. 144.

The question whether certain undisputed facts constitute a change of possession is a question of law for the court. *McCarthy v. McQuade*, 1 Sweeny, 387; *Randall v. Parker*, 3 Sandf. 69; S. C., 7 N. Y. Leg. Obs. 332.

The question of whether there was a delivery of a deed, be-

Questions for the court—Mixed questions.

comes a question for the court where the proof is such as to repel a presumption of an intent to deliver. *Carnes v. Platt*, 1 Sweeny, 140; S. C., 38 How. 100; 7 Abb. N. S. 42.

The existence of fraud on an undisputed state of facts may be a question of law for the court; as where the law declares that the continued possession of mortgaged chattels by the mortgagor shall be presumed to be fraudulent. *Edgell v. Hart*, 9 N. Y. (5 Seld.) 213; *Griswold v. Sheldon*, 4 N. Y. (4 Comst.) 581. But, where there is any material and pertinent evidence of good faith, the question is one of fact, and must be submitted to the jury. *Ib.* See *Frost v. Warren*, 42 N. Y. (3 Hand) 204; *Miller v. Lockwood*, 32 N. Y. (5 Tiff.) 293.

The question of intent, although usually one of fact, to be decided by the jury, is not necessarily so; for it may, sometimes, become a question of law for the court. *Carnes v. Platt*, 1 Sweeny, 140; S. C., 38 How. 100; 7 Abb. N. S. 42.

The question as to whether a proved publication, not privileged, nor capable of an innocent construction, is libelous or not, is a question for the court. *Hunt v. Bennett*, 19 N. Y. (5 Smith) 173; *Lewis v. Chapman*, 16 N. Y. (2 Smith) 369; *Matthews v. Beach*, 5 Sandf. 256.

The question of probable cause, upon a given state of facts, is in all cases a question of law. *Carpenter v. Sheldon*, 5 Sandf. 77; *Bulkeley v. Smith*, 2 Duer, 261; S. C., 11 N. Y. Leg. Obs. 300; *Besson v. Southard*, 10 N. Y. (6 Seld.) 236; *Miller v. Milligan*, 48 Barb. 30; *Bulkeley v. Keteltas*, 6 N. Y. (2 Seld.) 384; *Burns v. Erben*, 40 N. Y. (1 Hand) 463.

Whether or not a river is a public highway is, the facts of the case being conceded, a question for the court. *Morgan v. King*, 18 Barb. 277.

Whether on a given state of facts a transaction constitutes a stated account, is a question of law. *Lockwood v. Thorne*, 11 N. Y. (1 Kern.) 170.

Whether a given state of facts constitutes a defense is a question for the court. *Holbrook v. Wilson*, 4 Bosw. 64.

Section 25. Mixed questions.

a. In general. A question which, if all the facts relating thereto were undisputed or clearly established, would be a question of law for the court, becomes, when such facts are disputed and involved in doubt, a mixed question of law and fact. As it is the province of a jury to pass upon all questions where there

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is a conflict of evidence, and the duty of the court to declare the law upon the facts found, all mixed questions of law and fact must be submitted to the jury, under the instructions of the court as to the law. The jury, in considering their verdict, determine first the facts, and these being found, proceed to apply the law which the court has declared applicable thereto. If the verdict is general, the determination of the jury upon the question presented can be determined only inferentially, unless the jury have been instructed to bring in a written finding thereon, as provided in section 261 of the Code.

The rule, that where the facts are not entirely clear, but depend upon conflicting testimony, the case must be submitted to the jury, is well settled. *Wolfkiel v. Sixth Avenue R. R. Co.*, 38 N. Y. (11 Tiff.) 49; S. C., 5 Trans. App. 217; *Barrett v. Third Avenue R. R. Co.*, 1 Sweeny, 568; S. C., 8 Abb. N. S. 205; *Roth v. Buffalo & State Line R. R. Co.*, 34 N. Y. (7 Tiff.) 548; *Ernst v. Hudson River R. R. Co.*, 35 N. Y. (8 Tiff.) 9; S. C., 32 How. 61; 3 Abb. N. S. 82, 88; 1 Trans. App. 53; *Bateman v. Ruth*, 3 Daly, 378.

The following have been decided to be mixed questions of law and fact, where there is deficient or conflicting evidence:

The question of reasonable diligence, or reasonable time. *Wilbeck v. Holland*, 45 N. Y. (6 Hand) 13; *Roth v. Buffalo & State Line R. R. Co.*, 34 N. Y. (7 Tiff.) 548.

The question of negligence, contributory or otherwise. *Wolfkiel v. Sixth Avenue R. R. Co.*, 38 N. Y. (11 Tiff.) 49; S. C., 5 Trans. App. 217; *Ernst v. Hudson River R. R. Co.*, 35 N. Y. (8 Tiff.) 9; S. C., 32 How. 61; 3 Abb. N. S. 82; 1 Trans. App. 53; *Bateman v. Ruth*, 3 Daly, 378.

The question of fraudulent intent in the execution of a mortgage of chattels. *Frost v. Warren*, 42 N. Y. (3 Hand) 204; *Gardner v. McEwen*, 19 N. Y. (5 Smith) 123; *Griswold v. Shelden*, 4 N. Y. (4 Comst.) 581.

The question of the interpretation of an alleged libel, where the language is ambiguous, and capable of being understood in an innocent and harmless, as well as in an injurious sense. *Lewis v. Chapman*, 16 N. Y. (2 Smith) 369. So the question whether an alleged libel has in fact been published, or whether a publication is a privileged communication, is a question for the jury. *Klinck v. Colby*, 46 N. Y. (1 Sick.) 427.

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The question as to the terms of a contract and the intent of the parties. *Chapin v. Potter*, 1 Hilt. 366; *Pendleton v. Empire Stone Dressing Co.*, 19 N. Y. (5 Smith) 13; *Gardner v. Clark*, 17 Barb. 538; *Scott v. Pentz*, 5 Sandf. 572; *Bridgeport City Bank v. Empire Stone Dressing Co.*, 19 How. 51; S. C., 30 Barb. 421.

The question as to the time when certain material alterations, erasures or interlineations in a contract were made. *Pringle v. Chambers*, 1 Abb. 58. And, also, whether the contract was executed at the time it bears date. *Genter v. Morrison*, 31 Barb. 155. See *Carnes v. Platt*, 1 Sweeny, 140; S. C., 38 How. 100; 7 Abb. N. S. 42.

The question of the existence of the facts which, if established, will constitute a probable cause for prosecution. *Bulkeley v. Keteltas*, 6 N. Y. (2 Seld.) 384; *Haupt v. Pohlmann*, 1 Rob. 121; S. C., 16 Abb. 301; *Burns v. Erben*, 40 N. Y. (1 Hand) 463.

The question whether a particular obstruction or erection is a nuisance. *Morgan v. King*, 18 Barb. 277; *St. John v. Mayor, etc., of New York*, 6 Duer, 315; S. C., 13 How. 527.

The question whether an act was willful and malicious, or otherwise. *Jackson v. Second Avenue R. R. Co.*, 47 N. Y. (2 Sick.) 274.

There are certain general rules relating to the instructions to be given to a jury, when called upon to pass upon a question of mixed law and fact, that may be important to notice.

The court is not bound, without the request of parties, to give any instructions to the jury. *Carter v. Bennett*, 4 Fla. 283; *Averett v. Brady*, 20 Ga. 523; *Wood v. Figard*, 28 Penn. St. 403; *Ward v. Herrin*, 4 Jones, 23; *Briggs v. Byrd*, 12 Ired. 377; *Jones v. State*, 20 Ohio, 34. Jurors are presumed to be acquainted with all the rules of law in regard to which the parties do not request that they be instructed, or in regard to which the court does not instruct them. *Haupt v. Pohlmann*, 1 Rob. 121; S. C., 16 Abb. 301. The court should give clear and distinct instructions to the jury, when instructions are requested or given, but the court need not enter into minute distinctions. *Pendleton v. Empire Stone Dressing Co.*, 19 N. Y. (5 Smith) 13.

It is not the duty of the court to charge upon any abstract proposition contained in a request, and in no way relating to the questions submitted to the jury. *Bedell v. Commercial Mut. Ins. Co.*, 3 Bosw. 147. Neither will the court be justifiable in sub-

Mixed questions — Questions for the jury.

mitting to the jury an hypothesis wholly unwarranted by the evidence. *Storey v. Brennan*, 15 N. Y. (1 Smith) 524; *Rouse v. Lewis*, 2 Keyes, 352; *Liddle v. Hodges*, 2 Bosw. 537.

The court cannot be required, in its charge to the jury, to express an opinion upon a question of fact. *Moore v. Meacham*, 10 N. Y. (6 Seld.) 207. But it is not error for the court, in giving a charge, to express an opinion upon the facts, if the rules of law are given to the jury and they are thereby enabled to determine the questions of fact then left for their final decision. *Hunt v. Bennett*, 4 E. D. Smith, 647; *Bruce v. Westervelt*, 2 id. 440; *Dows v. Rush*, 28 Barb. 157.

The court is not bound to submit a question of fact to the jury when their verdict, if contrary to his views of the testimony and its legal effect, would certainly be set aside as against law and evidence. *Godin v. Bank of the Commonwealth*, 6 Duer, 76.

Section 26. Questions for the jury.

a. In general. It is a general rule that all questions of fact concerning which there is conflicting testimony should be submitted to the jury.

The assessment of damages rests, as a general rule, with the jury only; subject to the instruction and direction of the court as to the measure of damages in any particular case.

The rule as to the measure of damages so given is the basis upon which the jury must assess the damages; and if explicit instructions are asked for and refused, or if erroneous instructions are given, it will be a cause for a new trial. *Green v. Hudson River R. R. Co.*, 32 Barb. 25.

So when the damages to be given are limited to an indemnity, the court may instruct the jury to find the particular items of damage and the sums applicable to each. *Partridge v. Gilbert*, 3 Duer, 184.

The intent of parties is generally a question of fact for the jury. *Horton v. Moot*, 60 Barb. 27. And yet questions of intent need not necessarily be submitted to a jury. See *Carnes v. Platt*, 1 Sweeny, 140; S. C., 38 How. 100; 7 Abb. N. S. 42.

It is impossible to point out what particular questions should be submitted to a jury, beyond the general rule that all controverted facts upon which there is conflicting evidence should be so submitted. The questions of law that must be decided by

The charge.

the court have been already noticed, as have also the questions which must be decided under the discretion of the court.

Section 27. The charge.

a. In general. It is nearly an invariable practice for the court to charge the jury when the evidence is 'all in and the counsel on both sides have summed up. The purpose of a charge to the jury is to lay before them an impartial statement of the whole case. Generally the judge in his charge first states concisely the precise issue between the parties, the substance of the plaintiff's claim, and the grounds of the defense; and, secondly, proceeds to review as fully as he may deem necessary the evidence which has been given on the trial, explaining its application to the points in issue. He may also attempt to reconcile the testimony when it is *prima facie* conflicting, or may sharply present the points of conflict in the testimony, and leave it for the jury to decide as to which of the witnesses is entitled to credit. See *Jackson v. Packard*, 6 Wend. 415. It is the duty of the court as well as of juries, to attempt to reconcile testimony apparently contradictory, if by any proper view it can be made consistent. *Warren v. Haight*, 62 Barb. 490.

The credibility of a witness is generally a question for the jury, and it is seldom proper for the judge to instruct them that they have no right to believe a witness. *Conrad v. Williams*, 6 Hill, 444; *Dunlop v. Patterson*, 5 Cow. 243; *Dunn v. People*, 29 N. Y. (2 Tiff.) 523. But, on the other hand, it is in many cases both proper and necessary for the judge to instruct the jury as to the rules and principles which should guide them in determining questions of credibility. *Ib.* Thus, it is not error for a judge to charge the jury, in an action for a conspiracy, that they may find for the plaintiff, against the defendants, on the evidence of an alleged accomplice, even though unsupported and uncorroborated, but at the same time instructing them as to the weight and value of such evidence, and the caution to be exercised in considering it. *Ynguanzo v. Solomon*, 3 Daly, 153; *Royal Ins. Co. v. Noble*, 5 Abb. N. S. 54; *Dunn v. People*, 29 N. Y. (2 Tiff.) 523; *People v. Dyle*, 21 N. Y. (7 Smith) 578. So where it appears upon the trial, that a witness then examined has sworn differently upon the same point on a former occasion, the court should, in the charge, harmonize the statements if possible, and leave the question of credibility to the jury under proper instructions. *Warren v. Haight*, 62 Barb. 490. The judge

The charge.

should call the attention of the jury to the circumstances under which the apparently contradictory evidence was given ; to the influences under which such statements were made or obtained ; if made in writing, whether deliberately written by the witness himself, or whether prepared by another whose interest it was to have the statement in a particular form ; whether the statement was read and fully understood by the witness, or whether it was signed in the full confidence that it was right, upon the statement of another. *Ib.*

So where a witness has been impeached upon the trial, it is proper for the court to charge that an impeached witness may tell the truth ; but that he does not stand before the jury as one whose character had not been attacked, and that, if from his manner, the circumstances of the case, and the corroboration of other witnesses, the jury believe his statement, it will be competent for them to act upon his testimony ; and, on the other hand, they will be entirely justified in disregarding it. *Lee v. Chadsey*, 2 Keyes, 543 ; S. C., 3 id. 225. So where the witness's relation of material facts is contradicted in one or more important particulars, about which he cannot be simply mistaken, the judge may instruct the jury that they may disbelieve the whole of the statement of such witness or not, but cannot properly charge them, as a matter of law, that the evidence was not entitled to credit. *Wilkins v. Earle*, 44 N. Y. (5 Hand) 172.

The judge may properly criticise in his charge the testimony of a witness, or give his opinion as to the proper interpretation, construction and effect of the language of the witness, unless the expression of such opinion will be prejudicial to one of the parties. *Ynguanzo v. Solomon*, 3 Daly, 153.

The judge may charge the jury in a proper case, that if they believe the testimony of defendant's witnesses, they must find a verdict for the defendant. *Downs v. Sprague*, 2 Keyes, 57. So he may charge the jury that the omission of the party to produce written evidence, admitted to be under his control, is a circumstance from which they may pronounce against the party as to the facts of which such document would be evidence. *Hager v. Hager*, 38 Barb. 92 ; *Sutton v. Sadler*, 3 C. B. N. S. 87. So in an action for seduction, where the testimony is conflicting, the court may charge the jury that they have a right to consider evidence offered by the defendant tending to prove a want of

The charge — Questions of fact — Discretion.

chastity in the person alleged to be seduced, in connection with other evidence as bearing on the question of actual seduction. *Hogan v. Cregan*, 6 Rob. 138.

b. Questions of fact. But while a judge may comment on the weight due to the testimony of witnesses, he will not generally state to the jury his conclusions as to any questionable or disputed facts. *Vedder v. Fellows*, 20 N. Y. (6 Smith) 126. Yet, should he volunteer an opinion on a matter of fact, the judgment rendered in the action cannot, on that account, be reversed, provided the opinion was delivered as a mere opinion, and the jury were clearly informed and made to understand that the remarks of the judge were not made as a direction, but that they were to decide the fact. *Vail v. Rice*, 5 N. Y. (1 Seld.) 155; *N. Y. Firemen's Ins. Co. v. Walden*, 12 Johns. 513; *Stettiner v. Granite Ins. Co.*, 5 Duer, 594; *Read v. Hurd*, 7 Wend. 408; *Hager v. Hager*, 38 Barb. 92; *Altholf v. Wolf*, 2 Hilt. 344; *Bruce v. Westervelt*, 2 E. D. Smith, 440; *Durkee v. Marshall*, 7 Wend. 312; *Jackson v. Packard*, 6 id. 415. The propriety, however, of the practice of expressing an opinion on a question of fact in a charge to a jury may be doubted, even where it is announced to the jury that the question is one of fact for their determination, and that should they not concur in the opinion expressed, they are at liberty to decide the reverse. In most instances the jury would concur with the expressed opinions of the court on a question of fact, and parties would in effect be deprived of their constitutional right to have their cases decided by a jury. *Vedder v. Fellows*, 20 N. Y. (6 Smith) 126.

A judge cannot be required to express an opinion as to a matter of fact, much less to charge as to a belief, where the evidence would not warrant him to decide the point. *Moore v. Meacham*, 10 N. Y. (6 Seld.) 207.

A party who is dissatisfied with the expression of an opinion by a judge, on a question of fact, or the conclusion at which he arrives in regard to it, must express that dissatisfaction, not by excepting to the charge of the judge on that point, but by asking to have the question submitted to the jury for their determination. *Dows v. Rush*, 28 Barb. 157; *Carnes v. Platt*, 6 Rob. 270; *Mallory v. Tioga R. R. Co.*, 36 How. 202; S. C., 1 Trans. App. 203; 3 Keyes, 354; 5 Abb. N. S. 420.

c. Discretion. As has been previously stated, the court is not bound, without the request of parties, to give any instructions to

Requests to charge.

the jury ; and jurors are presumed to be acquainted with all the rules of law, in regard to which the parties do not request them to be instructed, or in regard to which the court does not instruct them. *Haupt v. Pohlmann*, 1 Rob. 121 ; S. C., 16 Abb. 301. See *Graser v. Stellwagen*, 25 N. Y. (11 Smith) 315.

d. Requests to charge. Whenever a party is dissatisfied with the charge of the court, on the ground that it is omissive, he should explicitly request the court to give what he deems to be the proper instructions to the jury. *Harris v. Northern Indiana R. R. Co.*, 20 N. Y. (6 Smith) 232 ; *Graser v. Stellwagen*, 25 N. Y. (11 Smith) 315. It is no error for the court to omit to pass upon a question of law which was not submitted to him for decision, or to omit to instruct the jury upon a point concerning which no request for instruction was made. *Atlantic Dock Co. v. City of Brooklyn*, 3 Keyes, 444 ; S. C., 3 Trans. App. 305. So it is not error for the court to fail to submit to the jury a particular question of fact, where he has not been requested to so submit it. *Dows v. Rush*, 28 Barb. 157 ; *Mallory v. Tioga R. R. Co.*, 1 Trans. App. 203 ; S. C., 3 Keyes, 354 ; 36 How. 202 ; 5 Abb. N. S. 420 ; *Schroff v. Bauer*, 42 How. 348 ; *Barnes v. Perine*, 12 N. Y. (2 Kern.) 18 ; *Marine Bank of City of New York v. Clements*, 31 N. Y. (4 Tiff.) 33. For this reason, if the judge, in his charge, assumes a fact to be proved, concerning which there is contradictory proof, or no proof at all, it is incumbent on counsel to call his attention to the matter at the time, in order that the error may be corrected.

But if the judge incorrectly charges the law to the jury, and such error may have injuriously affected the party, and he has excepted thereto, the counsel for the party need not, in order to place himself in a position to correct the error, request the judge to charge correct propositions, which are antagonistic to his charge, nor request him to submit matters of fact to the jury. *Carnes v. Platt*, 6 Rob. 270.

A request to charge the jury should be in such form that the court may charge, in the terms of the request, without qualification. *Carpenter v. Stilwell*, 11 N. Y. (1 Kern.) 61 ; *Winchell v. Hicks*, 18 N. Y. (4 Smith) 558 ; *Keller v. N. Y. Central R. R. Co.*, 24 How. 172 ; *Bagley v. Smith*, 10 N. Y. (6 Seld.) 489 ; S. C., 19 How. 1. A request to charge, if erroneous in part as embracing too much, will be wholly unavailing. *Hodges v. Cooper*, 43 N. Y. (4 Hand) 216. Thus, where a request to charge embraces

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several propositions, distinct, though related, the judge will not be in error in refusing to adopt the whole, if there is any one of them which he might correctly refuse to charge. *Willets v. Sun Mutual Ins. Co.*, 45 N. Y. (6 Hand) 45. The court cannot be compelled to separate the several propositions, picking out and charging the good, and rejecting and refusing to charge only the bad. *Ib.*; *Keller v. N. Y. Central R. R. Co.*, 24 How. 172; *Carpenter v. Stilwell*, 11 N. Y. (1 Kern.) 61.

But where the different propositions are separately stated, a single request to charge is sufficient, and the judge should respond to each proposition, provided it presents a question of law bearing upon the evidence. But where the separate propositions are very numerous, and the charge covers generally the questions of law presented, the counsel should again call the attention of the judge to any proposition which he deems not fully answered. *Zabriskie v. Smith*, 13 N. Y. (3 Kern.) 322.

The party requesting the court to charge the jury as to a specified proposition may be called upon to point out the evidence upon which the request is based; and if the party cannot point out evidence which would warrant the jury to find facts without which the instructions requested would have no application to the case, the judge may properly refuse to charge as requested, although as an abstract proposition of law, the desired instructions may be correct. *Kiernan v. Rocheleau*, 6 Bosw. 148. A court can never be called upon to charge upon an assumed state of facts not proved upon the trial. *Pratt v. Ogden*, 34 N. Y. (7 Tiff.) 20; *Noakes v. People*, 25 N. Y. (11 Smith) 380; *City of New York v. Price*, 5 Sandf. 542; *Rushmore v. Hall*, 12 Abb. 420.

Where a party makes a proper request that the jury be charged that a certain proposition contains the true legal rule applicable to a given state of facts he is entitled to have the proposition given to the jury substantially as embodied in the request, without any qualifications, or to have the request plainly refused. *Wilds v. Hudson River R. R. Co.*, 24 N. Y. (10 Smith) 430; *S. C.*, 23 How. 492; *Warner v. N. Y. Central R. R. Co.*, 44 N. Y. (5 Hand) 465; *Meyer v. Clark*, 45 N. Y. (6 Hand) 285. But it is not necessary that the charge of the judge should express the propositions in precisely the terms embodied in the request of the counsel, provided the charge contains substantially the propositions presented. *Sherman v.*

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Wakeman, 11 Barb. 254; *First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.*, 23 How. 448; *Williams v. Birch*, 6 Bosw. 299. Nor is it necessary that the judge should charge the jury particularly as requested where he has previously charged them in substance as requested. *Holbrook v. Utica & Schenectady R. R. Co.*, 12 N. Y. (2 Kern.) 236; *Decker v. Mathews*, id. 313. In some cases it may be necessary to request the court to submit material questions of fact to the jury; and an omission to make such request will entitle the court to decide them by directing a verdict. The cases in which such request is necessary will be considered hereafter. See "Directing Verdict," letter *f*, *post*.

e. Refusal to charge. As has been previously stated, the judge may properly refuse to charge any matter that has been substantially charged already, or in respect to which no evidence has been given on the trial. So he may properly refuse to charge, in accordance with a request which assumes as correct, either of two aspects of a case as presented by conflicting testimony. *Watson v. Gray*, 4 Keyes, 385; *Le Roy v. Park Fire Ins. Co.*, 39 N. Y. (12 Tiff.) 56; S. C., 6 Trans. App. 316; *Meyer v. Clark*, 2 Daly, 497. So he may properly refuse to charge in accordance with a request, erroneous in part as embracing too much. *Hodges v. Cooper*, 43 N. Y. (4 Hand) 216.

f. Directing verdict. The court is authorized to direct the jury to find a verdict for a party when there is no conflict in the evidence and no dispute about the facts, or where there is such a preponderance of evidence on one side that a verdict to the contrary would be set aside as against evidence. *Besson v. Southard*, 10 N. Y. (6 Seld.) 236; *Herring v. Hoppock*, 15 N. Y. (1 Smith) 409; *Porter v. Havens*, 37 Barb. 343; *Godin v. Bank of the Commonwealth*, 6 Duer, 76; *Moore v. Westervelt*, 1 Bosw. 357; *Goelet v. Ross*, 15 Abb. 251.

In certain cases, also, the court will be justified in directing the jury to find a verdict for a party, and thus decide the issues involved, even where the evidence presented on the trial is conflicting, and the questions of fact are such as might properly be submitted to the jury, if either party had expressly requested that such facts be so submitted. Thus, where a defendant, at the close of the evidence, moves for a nonsuit upon the facts assumed to have been established by the evidence, the defendant assumes by the position taken, that there are no disputed facts to be

Directing verdict — Exceptions to charge or refusal.

determined by the jury, but that questions of law only are involved, the decision of which will determine the rights of the parties. If the facts presented on the trial will warrant it, the court, on denying the motion for a nonsuit, may properly direct a verdict for the plaintiff, unless the counsel for the defendant expressly requests the court to submit the question of fact to the jury. In the absence of such request an exception to the direction of the judge will be insufficient to raise the question for review in an appellate court. *Graser v. Stellwagen*, 25 N. Y. (11 Smith) 315; *O'Neill v. James*, 43 N. Y. (4 Hand) 84; *Barnes v. Perine*, 12 N. Y. (2 Kern.) 18; *Winchell v. Hicks*, 18 N. Y. (4 Smith) 558. But where the parties have done nothing to induce the belief that there is no question of fact involved, the court will not be justified in directing a verdict, unless in the cases before mentioned where there is no conflict of evidence, or where there is such a preponderance of evidence on one side that a verdict to the contrary would be set aside as against evidence. See *Stone v. Flower*, 47 N. Y. (2 Sick.) 566; *Sheldon v. Atlantic Fire & Marine Ins. Co.*, 26 N. Y. (12 Smith) 460.

g. Exceptions to charge or refusal. It is important that a party prejudiced by the charge should raise his objections thereto in such a manner as to entitle him to a review of the matter in the appellate court. The proper mode of raising these objections is by exceptions to the charge or refusal to charge.

A general exception to a charge containing distinct propositions is unavailing, unless the party excepting can show that each proposition is erroneous to his prejudice. *Haggart v. Morgan*, 5 N. Y. (1 Seld.) 422; *Stone v. Western Transportation Co.*, 38 N. Y. (11 Tiff.) 240; S. C., 7 Trans. App. 223; *Coughlan v. Dinsmore*, 4 id. 386; S. C., 35 How. 416. An exception to the whole and to each and every part of a charge is equally unavailing, if any part of the charge is correct. *Jones v. Osgood*, 6 N. Y. (2 Seld.) 233; *Caldwell v. Murphy*, 11 N. Y. (1 Kern.) 416. The same rule applies to a general exception to an entire charge, so far as it does not conform to several written requests previously handed up, whether the exception is intended to reach portions of the charge as made, or a failure to charge all the propositions as requested. *Requa v. City of Rochester*, 45 N. Y. (6 Hand) 129; *Walsh v. Kelly*, 40 N. Y. (1 Hand) 556; *Chamberlain v. Pratt*, 33 N. Y. (6 Tiff.) 47.

In order to make a valid exception to a failure to charge any

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one or more of a series of propositions handed up to the judge with a request to charge, it is the duty of the counsel, at the close of the charge, to call the attention of the court to any one of the requests as to which he desires more specific or different instructions. *Walsh v. Kelly*, 40 N. Y. (1 Hand) 556; *Requa v. City of Rochester*, 45 N. Y. (6 Hand) 129. The office of an exception is to point out some specific error in law; and the counsel should, by his exception, lay his finger upon the precise request refused, or the error in the charge, not only that the court may, upon the error being pointed out, correct it, but also that the appellate court may not be left to spell out and dig up errors, which, after they are discovered, are more apparent than real, and may have arisen from mere inadvertence, or a misapprehension upon the trial. *Ayrault v. Pacific Bank*, 47 N. Y. (2 Sick.) 570.

An exception to a single word in a sentence of a judge's charge, which has no bearing upon any issue or question in the case, will not be allowed or entertained. *Raynor v. Timerson*, 51 Barb. 517.

If the judge in his charge to the jury states the law incorrectly, and such error injuriously affects a party who excepts thereto, it is not necessary that the party should request the judge to charge correct propositions, which are the converse of those charged, in order to present the question in a position for review by the appellate court. An exception to the objectionable part of the charge will be sufficient to present the question on appeal. *Carnes v. Platt*, 6 Rob. 270. When the objection is so presented, a verdict for the adverse party must be set aside, unless it is shown that the error did not and could not have affected the verdict. It is not for the party excepting to show how he was prejudiced by the error; but it is for the party in whose favor the verdict was rendered to show that no injury could possibly have arisen from it. *Greene v. White*, 37 N. Y. (10 Tiff.) 405; S. C., 4 Trans. App. 382.

When a request that a matter of fact be submitted to the jury is necessary to a review of the direction of a verdict by the court, and where an exception to such direction is equally efficacious has been already discussed. See p. 179, 180, 182, *ante*; and see *Stone v. Flower*, 47 N. Y. (2 Sick.) 566; *O'Neill v. James*, 43 N. Y. (4 Hand) 84; *Graser v. Stellwagen*, 25 N. Y. (11 Smith) 315; *Barnes v. Perine*, 12 N. Y. (2 Kern.) 18.

Section 28. Consultations of jury.

a. In general. After the judge has charged the jury, they should proceed to consult upon their verdict. If they are already unanimous as to their verdict, they may render it at once without retiring from the court; or if they cannot agree at once they may retire to some convenient place in charge of an officer who is sworn to keep them without any intermission, refreshment, fire or light, except such as may be allowed by the court, and without any communication with any other person, until they shall have agreed upon their verdict or shall be discharged.

On retiring to the jury room, the court may, in its discretion, with or without the consent of parties, allow the jury to take with them any documentary evidence given on the trial. *Howland v. Willetts*, 9 N. Y. (5 Seld.) 170; *Porter v. Mount*, 45 Barb. 422; *Schappner v. Second Avenue R. R. Co.*, 55 id. 497. So, if the jury take with them on retiring to deliberate on their verdict a paper which has not been put in evidence, their verdict will not on that account be set aside if it appears that their verdict was not influenced thereby. *Schappner v. Second Avenue R. R. Co.*, 55 Barb. 497. See *Merritt v. Brinkerhoff*, 17 Johns. 306; *Hackley v. Hastie*, 3 id. 252.

It is only by general consent, if at all, that the jury may properly take to the jury room, on retiring to deliberate on their verdict, the minutes of the testimony taken by the counsel for either party, or even the minutes of the judge. *Durfee v. Eve-land*, 8 Barb. 48; *Neil v. Abel*, 24 Wend. 185.

In a justice's court, it is customary and allowable for the justice, at the request of the jury, to visit them in the jury room, for the purpose of giving them further instructions, provided he is accompanied by the counsel for all the parties, or is expressly authorized by them to visit the jury alone. *Thayer v. Van Fleet*, 5 Johns. 111; *Taylor v. Betsford*, 13 id. 487; *Whitney v. Crim*, 1 Hill, 61; *Moody v. Pomeroy*, 4 Denio, 115; *Henlow v. Leonard*, 7 Johns. 200. But in no case can the justice hold any communication with the jury in the absence and without the express consent of counsel, unless, perhaps, in cases where the justice has invited them to accompany him and they have refused. *Ib.* See *Rogers v. Moulthrop*, 13 Wend. 274.

In courts of record, however, it is neither customary nor allowable for the judge to hold any communication with the jury in their retirement, whether by letter or otherwise. If they desire

Persuading to agree—Mode of determination.

further instructions, he should order them to be brought into court, and there instruct them in the presence of counsel. *Sargent v. Roberts*, 18 Mass. (1 Pick.) 337; *State v. Frisby*, 19 La. An. 143; *Gholston v. Gholston*, 31 Ga. 625; *Crabtree v. Hagenbaugh*, 23 Ill. 349; *Fish v. Smith*, 12 Ind. 563.

b. Persuading to agree. It is proper that the judge, after the labor and expense of a trial, should endeavor, by all legitimate means, to secure a verdict. To this end he may properly urge the jury to engage in their deliberation in a spirit of liberal concession. He may properly explain to them the theory of the trial by jury; that its object is to give the parties the united judgment of twelve minds upon the questions at issue between them. He may properly invite their attention to the importance, both to the parties and to the public, of their agreeing upon a verdict, that thus the time and expense of a re-trial may be saved. These and other kindred considerations may, and frequently ought to be urged upon the consideration of the jury, to induce them to make an honest and faithful effort to bring their minds together and thus agree upon a verdict. *Green v. Telfair*, 11 How. 260. He may properly instruct them that the questions submitted to them for determination are not difficult, and to a reasonable extent urge an agreement. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. (2 Sick.) 282. But an attempt to influence the jury, by referring to the time they are to be kept together, or the inconvenience to which they are to be subjected, in case they shall be so pertinacious as to adhere to their individual opinions, and thus continue to disagree, is unjustifiable. A judge has no right to threaten or intimidate a jury, in order to affect their deliberations, or to allude to his purposes as to the length of time they are to be kept together. There must be nothing in his intercourse with the jury having the least appearance of duress or coercion. *Green v. Telfair*, 11 How. 260. The remedy of the parties against an abuse of the discretion of the court in these particulars is by motion to set aside the verdict, and not by exception and appeal. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. (2 Sick.) 282.

c. Mode of determination. The verdict of a jury is in the theory of the law, if not in fact, the result of the intelligent exercise of the reasoning powers and judgment of twelve men; and the law will not tolerate any verdict which, from the mode in which it was found, could not be the result of either.

 Mode of determination — Keeping jury together.

Thus, a jury will not be allowed to decide by lot in favor of which party their verdict shall be given. *Mitchell v. Ehle*, 10 Wend. 595; *Thompson v. Perkins*, 26 Iowa, 486; *Rable v. McDonald*, 7 Clarke, 90; *Elledge v. Todd*, 1 Humph. 431; *Parham v. Harney*, 6 Sm. & M. 55. Neither will they be allowed to assess damages by marking down the amount which each deems proper, and dividing the sum total by twelve. *Roberts v. Failis*, 1 Cow. 238; *Harvey v. Rickett*, 15 Johns. 87; *Smith v. Cheetham*, 3 Cai. 57. Neither will the jury be allowed to arrive at the value of property by taking an arithmetical average of the sums at which it was estimated by the witnesses. *Thomas v. Dickinson*, 12 N. Y. (2 Kern.) 364.

But if the jury, without agreeing to abide by the result, take an average of the amount of damage which each juror deems equitable as between the parties, and they afterward, individually, agree upon the result so obtained as their verdict, the verdict may be allowed to stand. *Dana v. Tucker*, 4 Johns. 487; *Conklin v. Hill*, 2 How. 6. See *Illinois & Mississippi Telegraph Co.*, 20 Iowa, 195; *Hendrickson v. Kingsbury*, 21 id. 379.

d. Keeping jury together. From the time the jury are charged and retire to deliberate, until they render their verdict in court, they cannot properly separate, but, on the contrary, should be kept together by the officer having them in charge.

A separation of the jury before rendering their verdict, although clearly irregular and a contempt of court, will not of itself vitiate their verdict. If there is no ground for suspicion that the irregularity has prejudiced either party, the verdict will not be set aside; but if, on the other hand, there is the slightest ground for such suspicion, the verdict will be set aside. *Smith v. Thompson*, 1 Cow. 221; *Anthony v. Smith*, 4 Bosw. 503; *Ex parte Hill*, 3 Cow. 355; *People v. Ransom*, 7 Wend. 417, 423; *Douglass v. Tousey*, 2 id. 352; *Oliver v. Trustees of First Presbyterian Church*, 5 Cow. 283; *Horton v. Horton*, 2 id. 589.

If one of the jury happens to be taken suddenly ill, so as to be incapable of remaining until the verdict is agreed on, the court may discharge that jury and charge another with the cause. *Rex v. Edwards*, 4 Taunt. 309; S. C., 3 Camp. 207.

The length of time during which a jury may be kept together for the purpose of agreement, as well as whether they shall be allowed to separate, whether they shall be allowed refreshments,

or whether they may bring in a sealed verdict, are matters resting in the discretion of the court, and for any abuse in the exercise of this discretion, redress may be obtained by a motion to set aside the verdict as for misconduct of the jury. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. (2 Sick.) 282.

As long as there is a reasonable prospect, in the judgment of the judge, of a final agreement of the jury, he may properly keep them together; but beyond this he is not at liberty to go. *Green v. Telfair*, 11 How. 260.

e. Misconduct of the jury. It was formerly held that the mere fact of drinking spirituous liquors by a juror, during the progress of a trial, was sufficient *per se* to warrant the setting aside of the verdict. *Brant v. Fowler*, 7 Cow. 562. The rule thus established by the earlier courts has, however, been abrogated, and the extreme severity of the old rules, in regard to the setting aside of verdicts on account of technical misconduct on the part of the jury, materially relaxed.

Under the present practice it is not every irregularity of a juror which will overturn the verdict, whether the irregularity consists in the drinking of spirituous liquors, separation without leave, or the like, unless there is some reason to suspect that the irregularity may have had some influence on the final result of the cause. *Wilson v. Abrahams*, 1 Hill, 207. The fact that jurors eat or drink at their own expense is no ground for disturbing their verdict, although it would be otherwise if they ate or drank at the expense of the successful party. *Ib.*

The least intermeddling or improper interference with the jury, or any of them, by a party during the trial, will vitiate the verdict, if rendered in his favor. *Reynolds v. Champlain Transportation Co.*, 9 How. 7; *Knight v. Inhabitants of Freeport*, 13 Mass. 218. But the rule is different where the interference comes from any person other than the successful party. Thus, where the officer having the jury in charge endeavors to induce them to agree upon a verdict in favor of the successful party, this direct interference will not be a sufficient ground for setting aside a verdict. *Baker v. Simmons*, 29 Barb. 198. See *Thomas v. Chapman*, 45 id. 98. So the officious intermeddling of strangers to the suit will not have the effect of vitiating the verdict. *Hager v. Hager*, 38 Barb. 92. See *Taylor v. Everett*, 2 How. 23.

On motion to set aside the verdict of a jury for misconduct, the evidence must be derived from the affidavits of persons other

Failure to agree — General verdict — When proper.

than the jurors; for, while the affidavit of a juror may be received in support of his verdict, it will not be received to impeach it. *Green v. Bliss*, 12 How. 428; *Clum v. Smith*, 5 Hill, 560; *Dana v. Tucker*, 4 Johns. 487. But, on a motion to set aside a verdict for misconduct on the part of the plaintiff, the affidavits of the jurors may be received to show the improper conduct. *Reynolds v. Champlain Transportation Co.*, 9 How. 7; *Thomas v. Chapman*, 45 Barb. 98.

f. Failure to agree. The Revised Statutes provide that when any jury shall be impaneled to try any issue, to make an inquiry, or to assess any damages, if they cannot agree after being kept together for such a time as shall be deemed reasonable by the court or officer before whom they shall have appeared and been impaneled, such court or officer may discharge them and issue a precept for a new jury, or order another jury to be drawn, as the case may require; and the same proceedings shall be had before such new jury as might have been had before the jury so discharged. 2 R. S. 554 (575), § 26.

Section 29. General verdict.

a. In general. The verdict of the jury may be either general or special. A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or the defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court. Code, § 260.

b. When proper. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or a special verdict. But in all other cases the court may direct the jury to find a special verdict, in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. Code, § 261.

If the jury bring in a general verdict, together with a written finding upon particular questions of fact, and such special finding is inconsistent with the general verdict, the special finding will control the general verdict, and the court will give judgment accordingly. Code, § 262; *Fraschieris v. Henriques*, 6 Abb. N. S. 251.

A general verdict will be proper, in actions to recover the possession of personal property and damages for its detention:

General verdict — Requisites of — Separate damages.

1st. Where there has not been a delivery of the property to the plaintiff, and the answer does not deny the value of the property as stated in the complaint; 2d. Where the property has been delivered to the plaintiff, and the answer does not claim a re-delivery. *Archer v. Boudinet*, 1 Code R. N. S. 372; *Tracy v. New York & Harlem R. R. Co.*, 9 Bosw. 396.

c. *Requisites of*. The general verdict of a jury must be one in which all the issues are pronounced upon generally, either in favor of the plaintiff or the defendant. See Code, § 260. A verdict which does not determine the right of the plaintiff to recover is not a general verdict. *Manning v. Monaghan*, 23 N. Y. (9 Smith) 539. While a general verdict must decide all the issues in the cause, if the finding upon one issue necessarily disposes of another, no express finding upon the latter is necessary. See *Law v. Merrills*, 6 Wend. 268.

Where there are several issues, some may be found for the plaintiff and others for the defendant.

When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a set-off for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury must assess the amount of the recovery. Code, § 263.

The findings in the verdict must be direct, and not evasive or argumentative. See *Freeman v. People*, 4 Denio, 9, 30.

d. *Separate damages*. In an action against several defendants on a joint demand, if one suffers default and the plaintiff succeeds against those who answer, the jury must assess damages against all. *Van Schaick v. Trotter*, 6 Cow. 599. But if he fails to show that he is entitled to recover against the defendants who have answered, he can have such assessment against those only who did not answer. *Sluyter v. Smith*, 2 Bosw. 673; *Callin v. Latson*, 4 Abb. 248; S. C., 13 How. 511.

Under the English practice, the jury in an action of trespass against several defendants jointly may find one of them guilty of the trespass at one time and the remainder at another. *Heydon's Case*, 11 Co. 5. So the jury may find one defendant guilty of one part of the trespass, and another of another. *Player v. Warn*, Cro. Car. 54. So the jury may find some guilty of the whole trespass and others of a part only; in all of which cases the jury may assess several damages. *Ib.*; 1 Archb. Pr. 219.

But under the practice in this State, the damages in actions

 Submitting specific questions.

for a tort, against two or more defendants are not divisible ; and should the jury erroneously assess different amounts against the defendants, the plaintiff may have judgment against all who are convicted, for the largest amount found against any one. *Beal v. Finch*, 11 N. Y. (1 Kern.) 128 ; S. C., 9 How. 385 ; *O'Shea v. Kirker*, 8 Abb. 69 ; S. C., 4 Bosw. 120. See *Turner v. McCarthy*, 4 E. D. Smith, 247.

e. Submitting specific questions. The Code provides that in every action for the recovery of money only, or specific real property, the jury in their discretion may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing, upon all or any of the issues ; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. Code, § 261.

The object of this provision of the Code has been heretofore discussed. See p. 166, 167, *ante*.

As the Code gives to a special finding of facts by a jury the power of controlling a general verdict, if the two are inconsistent, and as it requires the court to give judgment according to the facts found, the general verdict, as regards the particular questions submitted, becomes a mere matter of form. It is, in fact, merely a mode of having exceptions to the charge argued and carefully decided on a fuller examination than can be given them on the trial, without the necessity of a new trial in case of a mistake.

As the general verdict may be inconsistent with the special findings, the clerk cannot enter up judgment thereon, as he cannot determine what judgment is to be entered. Requiring a jury to answer specially, is, therefore, such a different direction, as to prevent the clerk from entering judgment according to the general verdict, under section 264 of the Code. Such judgment must be specially applied for, in order to determine such inconsistency and its extent. *Moss v. Priest*, 1 Rob. 632 ; S. C., 19 Abb. 314.

But the rendering of a general verdict by the jury, and its reception by the court without objection, either by the judge or the parties, is good, notwithstanding the failure of the jury to find upon certain special questions of fact upon which the court, in the course of its charge, directed them to find. *Ib*.

So if the special findings are given orally, instead of in writing as directed, by the Code, the verdict will be allowed to stand

Submitting specific questions—Damages.

although inconsistent with the answers given to the questions of fact submitted. *Ib.* If a general verdict is correct in all other respects it will not be set aside merely because the court should take a finding from the jury upon a matter which was in truth irrelevant, and which could not influence the general verdict, or the finding upon the other questions. *Forrest v. Forrest*, 6 Duer, 102.

The answers to the questions submitted to the jury must be filed with the clerk and entered upon his minutes. Code, § 261.

f. Damages. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a set-off for the recovery of money is established in excess of the plaintiff's demand as proved, the jury must assess the amount of the recovery. They may also, under the direction of the court, assess the amount of the recovery when the court gives judgment for the plaintiff on the answer. Code, § 263.

In assessing the damages, the jury, in their verdict, should not award a larger amount than is claimed by the complaint; as, in case a larger amount is awarded, the clerk should enter the verdict for only the amount claimed. *Barber v. Rose*, 5 Hill, 76. But, in case the verdict is entered for more than the sum claimed, the plaintiff may remit the excess, and take judgment for the amount claimed. *Ib.*; *Corning v. Corning*, 6 N. Y. (2 Seld.) 97; *Bowman v. Earle*, 3 Duer, 691. As to the terms imposed upon allowing an amendment, so that the complaint may claim the amount of the verdict. *Ib.*

In actions where double and treble damages may be recovered, if the jury find generally for the plaintiff, they should assess single damages, leaving it for the court to double or treble the damages as the case may require. *Dubois v. Beaver*, 25 N. Y. (11 Smith) 123; *Livingston v. Platner*, 1 Cow. 175; *King v. Havens*, 25 Wend. 420; *Newcomb v. Butterfield*, 8 Johns. 342.

The jury may, in proper cases, allow interest as a part of the damages assessed. Interest is, as a general rule, allowable in all actions on contract where the amount of the demand and the time when the same became payable is fixed by the terms of the contract. Interest is not allowable, as a general rule, on unliquidated demands. In actions of tort, the allowance of interest from the time of bringing the action, upon the items of damage sustained by the plaintiff, is within the discretion of the

In replevin — Oral verdict — Sealed verdict.

jury. *Walrath v. Redfield*, 18 N. Y. (4 Smith) 457. As to the allowance of interest generally, see Wait's Code, 466, 467.

g. In replevin. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or if the defendant, by his answer, claim a return thereof, the jury are required to assess the value of the property, if their verdict is in favor of the plaintiff; or, if they find in favor of the defendant, and that he is entitled to a return thereof. The jury may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention, or of the taking and withholding such property. Code, § 261.

h. Oral verdict. When the jury return to the bar, if they have retired to consider their verdict, their names are called over, and they are asked if they have agreed upon their verdict, and whether they find for the plaintiff or the defendant. The foreman of the jury, in the presence and hearing of the remainder of the jurors, then delivers the verdict. The verdict may be oral or in writing. But, except where the jury have been directed to bring in a sealed verdict, or where specific questions of fact have been submitted to them for their decision, an oral verdict is usually rendered. In proper cases the court may direct the verdict, and, when this is done, the jury, without leaving the bar, deliver their verdict in accordance with the directions of the court.

i. Sealed verdict. Where the jurors are unable to agree upon their verdict before the adjournment of the court for the day, the judge may direct the jury to return a sealed verdict. When this direction is given, the jury, upon agreeing upon their verdict, reduce it to writing, seal it, and deliver it to the officer having them in charge. The jury may then separate, without awaiting the re-opening of the court.

The judge may in all cases direct the jury to bring in a sealed verdict, in the absence of objection by the counsel for the parties. *Douglass v. Tousey*, 2 Wend. 352. The consent of the parties to this direction is not essential. *Green v. Bliss*, 12 How. 428.

In effect, a sealed verdict is no more valid or conclusive than an oral one. After it has been signed by all the jurors, any one of them may render it a nullity by dissenting from it at any

Rendition of the verdict — Alteration and correction of verdict.

time before it is entered. *Root v. Sherwood*, 6 Johns. 68. See *Green v. Bliss*, 12 How. 428.

j. Rendition of the verdict. The mode of rendering a verdict has been already noticed. See *ante*, 192.

The verdict, whether oral or sealed, must be delivered by the foreman of the jury, and in the presence of all the jurors. *Root v. Sherwood*, 6 Johns. 68. A verdict otherwise given is a nullity. *Ib.* If, when the verdict is announced, any of the jury dissent, the verdict rendered will be of no effect. *Ib.*

k. Alteration and correction of verdict. Even after the jury have returned to the bar, and the foreman has pronounced their verdict, they may alter and correct it at any time before it has been received and recorded. *Blackley v. Sheldon*, 7 Johns. 32. In case of manifest mistake, the court may also send a jury back to reconsider their verdict before it is recorded. *Ib.*

Where there is only one issue, and the intention of the jury to find for the plaintiff is manifest, the court will, in case of mistake by them, correct their verdict by making it conform to their finding, and give judgment upon it accordingly. *Wells v. Cox*, 1 Daly, 515.

So where there are two issues, and one has been disposed of by the judge, and the other has been submitted to the jury, and the jury evidently intended to pass upon both issues, the court may properly amend or correct their verdict, if it does not cover both issues as intended, by making it conform to the facts. *Burhans v. Tibbits*, 7 How. 21. The right to correct the verdict in such cases exists only where there is no doubt as to the facts; and if the slightest doubt exists as to what transpired on the trial, or if any exist whether the whole case has been disposed of by the court and the jury, the verdict will be vacated on motion. *Ib.*

Where the jury, in addition to their general verdict, find upon specific questions of fact, and the special finding of facts is inconsistent with the general verdict, the special finding must control, and the court must give judgment accordingly. Code, § 262. But inconsistency between the general verdict and the special findings of the jury will not authorize the judge at the circuit to direct that a verdict for one party be changed to a verdict for the other. *United States Trust Co. v. Harris*, 2 Bosw. 75; *Brush v. Kohn*, 9 id. 589; S. C., 14 Abb. 51.

l. Polling the jury. When the foreman has delivered the

Entry of verdict — Conclusiveness of verdict.

verdict of the jury, whether the same is sealed or oral, either party may require that the jury be polled as an absolute right. *Labar v. Koplin*, 4 N. Y. (4 Comst.) 547.

The object of polling a jury is to ascertain if the verdict which has just been presented or announced by their foreman is their verdict, or, in other words, if they still agree to it. The jury is polled by the clerk, who, as he calls over the list of jurors, asks them one by one, or by the poll, the question, "Is this your verdict?" The party has no right to dictate as to the manner in which a jury should be polled, or to insist on any other question being put to them than the one to ascertain whether they agree to the verdict as presented. *Ib.*

If each juror, on being polled, does not say that the verdict is his, the counsel for the unsuccessful party should call the attention of the court to the fact, otherwise he will waive the right to raise the objection. *Green v. Bliss*, 12 How. 428.

If, on the jury being polled, any of them dissent from the verdict, they may be sent out again for further deliberation. *Douglas v. Tousey*, 2 Wend. 352; *Bunn v. Hoyt*, 3 Johns. 255.

m. Entry of verdict. Upon receiving the verdict the clerk is required to make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon, or an order that the cause be reserved for argument or further consideration. Code, § 264. The special findings of fact, if any specific questions have been submitted to the jury, must be filed with the clerk and entered upon the minutes. Code, § 261. Having made the proper entry upon his minutes, the clerk calls upon the jury to hearken to their verdict as recorded by the court, and thereupon reads the verdict, adding, "And so say you all?" No dissent to the verdict can be made by a juror thereafter.

n. Conclusiveness of verdict. It is a general rule that the verdict of a jury is conclusive upon the question of fact submitted to them, if there is any evidence to support it. *Miller v. Lockwood*, 32 N. Y. (5 Tiff.) 293; *Ward v. Perrin*, 54 Barb. 89; *Hyatt v. Trustees of the Village of Rondout*, 44 id. 385; *Fleming v. Smith*, id. 554; *O'Hara v. Brophy*, 24 How. 379; *Sheldon v. Stryker*, 27 id. 387; S. C., 42 Barb. 284. It is also an intendment of the law that a verdict settles in favor of the prevailing party every question of fact litigated upon the trial. *Wolfe v. Goodhue Fire Ins. Co.*, 43 Barb. 400; *Van Pelt v. Otter*,

Assignment of verdict — Special verdict.

2 Sweeny, 202. But a verdict, which is manifestly unsupported by evidence, is in no sense conclusive and may be set aside. *Suydam v. Grand Street & Newton R. R. Co.*, 41 Barb. 375; S. C., 17 Abb. 304; *Deming v. Bailey*, 10 Bosw. 258; *Jacobsohn v. Belmont*, 7 id. 14. The rule is, that if, upon the whole evidence, it would have been proper at the trial to have taken the case from the jury and directed a verdict, then the court will set the verdict aside if found against what such direction should have been. *Barrett v. Third Avenue R. R. Co.*, 1 Sweeny, 568; S. C., 8 Abb. N. S. 205.

o. Assignment of verdict. The prevailing party in an action at law may, before judgment, assign the verdict obtained by him, together with the judgment to be entered thereon. *Mackey v. Mackey*, 43 Barb. 58; *Ferguson v. Bassett*, 4 How. 168; *Countryman v. Boyer*, 3 id. 386; S. C., 2 Code R. 4; *Nash v. Hamilton*, 3 Abb. 35.

A judgment cannot be set off against a mere verdict, before judgment has been entered thereon; and where such verdict has been assigned before judgment, and the party against whom it was rendered has had notice of that fact, no judgment can be set off against the judgment entered on such verdict. *Ib.*

p. Setting aside verdict. The judge who tries a cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial, upon exceptions, or for insufficient evidence, or for excessive damages. But such motion can only be heard at the same term or circuit at which the trial is had. Code, § 264.

For the cases in which a verdict will be set aside and a new trial ordered. See New Trials.

q. Errors cured by verdict. See New Trials.

Section 30. Special verdict.

a. In general. The Code defines a special verdict as that by which the jury find the facts only, leaving the judgment to the court. Code, § 260. A mixed verdict, or a verdict in which special matter follows or is followed by general matter, is, in effect, substantially a special verdict, as in case of inconsistency between the general and the special finding, the latter controls. Code, § 262; *Fraschieris v. Henriques*, 6 Abb. N. S. 251.

In certain cases the Code leaves it to the discretion of the jury whether they will render a general or a special verdict. But this right of election exists in actions for the recovery of money

Special verdict — How prepared.

only, or specific real property. In all other cases the court may require the jury to find a special verdict, in writing, upon all or any of the issues. Code, § 261.

The Code has made no alteration in the requisites of a special verdict. *Eisemann v. Swan*, 6 Bosw. 668; *Williams v. Willis*, 7 Abb. 90; *Fraschieris v. Henriques*, 6 Abb. N. S. 251. The verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented that nothing remains for the court but to draw the conclusions of law. *Langley v. Warner*, 3 N. Y. (3 Comst.) 327; *Sisson v. Barrett*, 2 N. Y. (2 Comst.) 406; *Hill v. Covell*, 1 N. Y. (1 Comst.) 522; *Seward v. Jackson*, 8 Cow. 406.

A special verdict should find facts and not leave them to be made out by argument and inference. *Birckhead v. Brown*, 5 Hill, 634. See *Freeman v. People*, 4 Denio, 9, 30. If the jury find the evidence merely, without stating their own conclusions, a new trial will be necessary. But if, on mixed questions of law and fact, the jury find facts from which the court can draw clear conclusions, it is no objection to the verdict, that the jury have not themselves drawn such conclusions and stated them as facts. *Seward v. Jackson*, 8 Cow. 406.

The special verdict must find all the facts which are requisite to enable the court to say, upon the pleadings and verdict, without looking into the evidence, which party is by law entitled to judgment. *Eisemann v. Swan*, 6 Bosw. 668. A special verdict need not, however, find facts admitted by the pleadings. *Barto v. Himrod*, 8 N. Y. (4 Seld.) 483. Nor is it necessary for the jury to find the negative of a fact which will not be presumed except it be found by the verdict. *Rogers v. Eagle Fire Co. of New York*, 9 Wend. 611, 625.

The verdict should not be in effect a record of the proceedings on the trial, nor should it in any way allude to the attendance of the parties, the verification of the pleadings, or the sufficiency of the evidence. *Powell v. Waters*, 8 Cow. 669; *Richmond v. Tallmadge*, 16 Johns. 307; *Merwan v. Ingersol*, 3 Cow. 367.

b. How prepared. It is not customary to prepare a special verdict in its ultimate form at the trial, but to submit to the jury a rough draft of the issues of fact which they are required to decide, and to make a minute of their answers thereto.

The verdict must subsequently be settled by the judge, in the

following manner: The party intending to move for judgment on the verdict must prepare it in a suitable form, and serve a copy upon the adverse party within ten days after the trial. The adverse party may, within ten days thereafter, propose amendments thereto and serve a copy on the moving party, who may, within four days thereafter, serve the opposite party with a notice that the verdict, with the amendments, will be submitted at a specified time and place to the justice who tried the cause, for settlement. Rule 41, Sup. Ct.

A failure on the part of one to propose amendments, or on the part of the other to notify an appearance, before the justice, will respectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed. Rule 42, Sup. Ct.

The party preparing the verdict must, before submitting the same to the judge or justice for settlement, mark upon the several amendments his proposed allowance or disallowance. Rule 43, Sup. Ct.

The verdict, when settled, must be filed with the clerk and entered upon the minutes. Code, § 261. See Rule 44, Sup. Ct.

c. Construction. In construing a special verdict, the court will keep in mind the issues made by the pleadings; and a fact found by a special verdict, which would be a bar to a recovery, or defeat a defense if properly pleaded, will be disregarded by the court in rendering judgment, if such fact does not properly arise under the issue joined. *McCarty v. Hudson*, 24 Wend. 291; *Richmond v. Tallmadge*, 16 Johns. 307.

d. Amendment. The court has power, under section 173 of the Code, to correct a mistake committed by the jury in their verdict, or to disregard any defect in the verdict under the provisions of section 176 of the Code.

The power of the court to amend a verdict does not, however, extend to errors in matters of substance. *United States Trust Co. v. Harris*, 2 Bosw. 75. But in rare cases the court has exercised its power to correct a verdict by amendment as has been already noticed. See "Correction and Alteration of Verdict," *ante*, p. 193, 194.

e. Stay of proceedings. It can seldom be necessary to obtain a stay of proceedings where a special verdict has been rendered by the jury, as judgment cannot be regularly entered thereon without an order of the court, and during the consequent delay

Bringing on argument — Argument — Verdict subject to opinion of court.

the unsuccessful party may take such action as may be deemed proper. Should, however, a stay be deemed necessary it may be obtained in the mode described in a preceding volume. See vol. 2, p. 622.

f. Bringing on argument. A motion for judgment on a special verdict is an enumerated motion (Rule 47, Sup. Ct.), and must in the first instance be heard and decided at the circuit or special term. Code, § 265; *Gilbert v. Beach*, 16 N. Y. (2 Smith) 606; *Manning v. Monaghan*, 23 N. Y. (9 Smith) 539. The motion must be noticed for the first day of the term. Rule 49, Sup. Ct. The notice to be given is the ordinary notice of motion and may be served by either party. But in all cases the plaintiff must furnish the defendant, at least eight days before the argument, with a copy of the special verdict. Rule 49, Sup. Ct. A copy of the verdict and the pleadings should also be furnished for the court. *Ib.* If the plaintiff neglects to furnish the necessary papers in due time, the defendant may move, on affidavit and notice of motion, that the cause be struck from the calendar, and that judgment be rendered in his favor. *Ib.* A note of issue must also be filed with the clerk.

g. The argument. The cause being regularly placed on the calendar, is called when reached, and the moving party opens the argument. In rendering judgment on the verdict, the court must act upon the facts as presented by the verdict, and cannot look into the evidence to ascertain the facts or any of them. *Eisemann v. Swan*, 6 Bosw. 668; *La Frombois v. Jackson*, 8 Cow. 589.

h. Proceedings after argument. The decision of the court on the motion for judgment must be embodied in the form of an order and entered with the clerk. The order may be for judgment, or for a new trial. *Hill v. Covell*, 1 N. Y. (1 Comst.) 522, 524; *Eisemann v. Swan*, 6 Bosw. 668, 674. If a judgment is ordered, the prevailing party may proceed to have it entered upon the order in the usual manner.

Section 31. Verdict subject to opinion of court.

a. In general. The Code provides, that where, upon a trial, the case presents only questions of law, the judge may direct a verdict subject to the opinion of the court at general term. Code, § 265.

This provision of the Code applies to jury trials only. *Malloy v. Wood*, 3 Abb. 369; S. C., 14 How. 67; 6 Duer, 657. And in

Verdict subject to opinion of court — Form of, — Preparation.

such trials has no application to special verdicts. *Gilbert v. Beach*, 16 N. Y. (2 Smith) 606.

As a verdict of this nature is authorized only where upon the trial the case presents questions of law only, it will be improperly ordered if a single question of fact is in dispute under the evidence. *Gilbert v. Beach*, 16 N. Y. (2 Smith) 606; *Cobb v. Cornish*, id. 602; S. C., 15 How. 407; 6 Abb. 129; *Mason v. Breslin*, 2 Sweeny, 386; S. C., 9 Abb. N. S. 427; 40 How. 436; *Chambers v. Grantzon*, 7 Bosw. 414; *Wilcox v. Hoch*, 62 Barb. 509. To authorize the order an uncontroverted state of facts must be presented, for the court at general term in such case has no right, of itself, to deduce facts from disputed or uncertain evidence. *Ib.*

A verdict, subject to the opinion of the court at general term, cannot properly be ordered where exceptions have been taken upon which the parties have a right to be heard, upon a motion for a new trial, as, for example, exceptions to the ruling of the court upon a question of evidence. *Cobb v. Cornish*, 16 N. Y. (2 Smith) 602; *Purchase v. Matteson*, 25 N. Y. (11 Smith) 211; S. C., 25 How. 161; 15 Abb. 402; *Bell v. Shibley*, 33 Barb. 610; *Sackett v. Spencer*, 29 id. 180; *Havemeyer v. Cunningham*, 8 Abb. 1; *Bangs v. Palmer*, 16 How. 542.

The court cannot properly direct a verdict for a specified amount, subject to the opinion of the general term, and at the same time order a reference to assess the damages of the plaintiff, in case the general term sustains his right of action. *Buchanan v. Chesebrough*, 5 Duer, 238.

Where the court directs a verdict, subject to the opinion of the court at general term, in a case where such direction could not properly be given, no exception to the direction is necessary to save the rights of the party prejudiced thereby. A failure to object, at the trial, to such disposition of the case, by the judge who tried it, cannot cure the irregularity or give vitality to an unauthorized order. *Purchase v. Matteson*, 25 N. Y. (11 Smith) 211; S. C., 25 How. 161; 15 Abb. 402.

b. Form of. The verdict, subject to the opinion of the court at general term, differs in form from the ordinary general verdict merely in the addition of the proviso that it is subject to the opinion of the court at general term.

c. Preparation. The direction that the verdict be rendered in favor of a particular party is a mere matter of form, as it is im-

Suspending entry of judgment — Bringing on for argument.

material whether the verdict is rendered in favor of one party or the other. Usually the only effect of rendering a verdict in favor of a party is, that it devolves upon him to prepare the case upon which the general term is to render judgment. *Cobb v. Cornish*, 16 N. Y. (2 Smith) 602. See *Williams v. Insurance Co. of North America*, 1 Hilt. 345; *Sharp v. Whipple*, 3 Bosw. 474.

The mode of preparing the case, on which to move for judgment at the general term, is, so far as relates to the settlement, service, printing, etc., the same as on a motion for a new trial.

The case, when settled, should present a statement of the facts established by the evidence, or conceded on the trial, together with a copy of the pleadings and the verdict. As the facts are beyond dispute, and the law only is involved in the controversy, the facts, and not the evidence of them, must be presented by the case made. The practice of setting out, *in extenso*, the evidence given upon the trial, is entirely improper, and when a case is so prepared, the court, at general term, may send it back for resettlement, at the expense of the party in whose behalf it was prepared. *People v. Ransom*, 56 Barb. 514.

d. Suspending entry of judgment. The mere fact that a verdict, subject to the opinion of the court at general term, has been rendered under the direction of the court, will, of itself, suspend the entry of judgment until the decision of the court of review, without any formal order to that effect. *Mason v. Breslin*, 40 How. 436; S. C., 9 Abb. N. S. 427; 2 Sweeny, 386; *Gilbert v. Beach*, 16 N. Y. (2 Smith), 606; *Roosa v. Snyder*, 12 How. 285; *Jackson v. Fitzsimmons*, 6 Wend. 546.

e. Stay of proceedings. If, in any aspect of the case, a stay of proceedings is necessary pending the decision of the court at general term, an application for an order to that effect should be made to the court at special term substantially in the manner pointed out in a preceding volume. See vol. 2, p. 622.

f. Bringing on for argument. It is the duty of the party in whose favor judgment was rendered at the circuit, to prepare and serve the necessary papers and to take such other steps as may be necessary preparatory to moving for judgment on the verdict.

The ordinary notice of motion must be given, a copy of the verdict served, and a note of issue filed at least eight days before the argument. See Rules 46, 48, 49, Sup. Ct.

The decision — Proceedings subsequent — Verdict in equity cases.

The cause is then placed on the calendar, and, on being called in its order, the party moves for judgment on the verdict.

g. The decision. Upon a verdict subject to the opinion of the court, the question for decision is never whether a new trial shall be granted, but which party, upon the conceded state of facts, shall have final judgment. *Cobb v. Cornish*, 16 N. Y. (2 Smith) 602; S. C., 15 How. 407; S. C., 6 Abb. 129. The fact that the counsel for either party fails on the argument to urge the particular reasons which would entitle the plaintiff to recover, or the defendant to a dismissal of the complaint, should not affect the decision. It is the duty of the court at general term to ascertain and declare the whole law upon the undisputed facts spread before it. *Oneida Bank v. Ontario Bank*, 21 N. Y. (7 Smith) 490. By directing a verdict subject to the opinion of the court at general term, by consent of the parties, all questions of form and variance are waived, and the supreme court is thereby requested and authorized to declare the law upon the statement of the controversy made for its consideration; and if, upon that statement, the verdict of the court at special term can be supported upon any theory consistent with the facts, even though not suggested by the pleadings, the moving party should have judgment on the verdict. *Ib.*

The judgment of the general term may be either for the plaintiff, or for the dismissal of the complaint. *Crittenden v. Empire Stone Dressing Co.*, 3 Abb. 71; S. C., 6 Duer, 30; *Kelley v. Upton*, 12 How. 140.

It is to be presumed, that upon a proper state of facts affirmative relief might be granted to the defendant when the conceded or settled facts and the law require it.

h. Proceedings subsequent. An order for judgment upon the verdict should be drawn up and entered with the clerk. Upon this order judgment may be regularly entered. The judgment so rendered may be reviewed by the court of appeals in the same manner, and with the like effect, as if exceptions had been duly taken at the proper time; provided it shall appear by the return that questions of law were involved in the rendition of the judgment. Code, § 265.

Section 32. Verdict in equity cases.

a. In general. The Code, after declaring what issues must be tried by jury, unless a jury trial is waived, or a reference ordered, declares that the court may order every other issue, or

Verdict in equity cases—Objections and exceptions—When exception lies.

any specific fact involved therein, to be tried by a jury. Code, §§ 253, 254. *Ante*, 10, 11.

Thus, on the trial of issues of fact, in an equity case, the court, in the exercise of a sound discretion, may submit to the jury additional issues arising upon the proofs, and material to the final determination. *Farmers and Mechanics' Bank v. Joslyn*, 37 N. Y. (10 Tiff.) 353; S. C., 4 Trans. App. 308.

There are also issues which cannot be properly said to arise in a civil action, as the term is used in the Code, which the statute declares shall be tried by jury. These are issues which, by statute, the court must direct to be made up and tried by a jury, on the reversal, upon a question of fact, of a surrogate's decree, admitting, or refusing to admit, a will for record or probate. 2 R. S. 66 (67), § 57.

The mode of preparing the issues, which under the Code are substitutes for the feigned issues of the old practice, has been pointed out in a preceding volume. See vol. 2, p. 464.

b. On feigned and awarded issues. The verdict, where specified issues of fact have been submitted to a jury, is, of necessity, in the form of an ordinary special verdict, and must conform to the rules already given in respect thereto. See § 30, *ante*, 195 to 198.

Section 33. Objections and exceptions.

a. In general. An exception, as the term is used in practice, is a formal objection to a decision of the court upon a question of law. An objection raises a question of law for the immediate decision of the court; an exception is a formal objection to that decision, made for the purpose of testing its correctness on a review by an appellate court. The objection is necessary to raise the question on which to obtain the decision; and the exception is equally necessary to present that question to the appellate court. See *Hunt v. Bloomer*, 13 N. Y. (3 Kern.) 341; S. C., 12 How. 567; *Magie v. Baker*, 14 N. Y. (4 Kern.) 435.

b. When exception lies. An exception should be to a decision of the court on some point of law, either relating to the admission or rejection of evidence, the challenge to a juror, or some other matter of law, arising upon a fact not denied, in which either party is overruled by the court. *Varnum v. Taylor*, 10 Bosw. 148; *Kelly v. Kelly*, 3 Barb. 419; *Graham v. Cammann*, 2 Cai. 168; *Burtch v. Nickerson*, 17 Johns. 217.

When exception does not lie — Exception, when taken.

An erroneous charge to the jury upon a matter of law is a ground for an exception. *Varnum v. Taylor*, 10 Bosw. 148.

And, in general, any decision of the court upon a matter which involves a strict legal right is a subject of exception.

c. When an exception does not lie. An exception lies only to the rulings of the judge, and not to the errors of the jury. *Stanley v. Webb*, 21 Barb. 148; *Foot v. Wiswall*, 14 Johns. 304. Thus, no exception can be properly taken to a verdict, although clearly against evidence and contrary to the instructions of the court. *Ib.*

An exception is not available for the purpose of reviewing the exercise of a discretionary power on the part of the court. *People v. Cook*, 8 N. Y. (4 Seld.) 67, 77; *Holbrook v. Wilson*, 4 Bosw. 64; *Garner v. Hannah*, 6 Duer, 262, 275; *Hunt v. Hudson River Fire Ins. Co.*, 2 id. 481; *Roth v. Schloss*, 6 Barb. 308; *Phinckle v. Vaughan*, 12 id. 215; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. (2 Sick.) 282.

No exception will lie to an expression of the opinion of the judge, in his charge to the jury, either as to the effect, or the weight of evidence; nor is a statement, by the judge, of some or all of the reasons which have operated on his mind and induced his ultimate decision upon the question before him, a subject of exception. *Smith v. Coe*, 1 Sweeny, 385; *Dows v. Rush*, 28 Barb. 157. Nor will an exception lie to an opinion expressed by the judge on a hypothetical case, put by the counsel of either party, for the reason that an opinion on an abstract proposition, not supported by the evidence in the case, is not the subject of an exception. *Walrod v. Ball*, 9 Barb. 271; *Vallance v. King*, 3 id. 548; *Lyon v. Marshall*, 11 id. 241; *Hayden v. Palmer*, 2 Hill, 205. But an exception will lie to the submission to the jury of a hypothesis wholly unwarranted by the evidence. *Storey v. Brennan*, 15 N. Y. (1 Smith) 524; *Rouse v. Lewis*, 2 Keyes, 352.

d. Exception; when taken. The Revised Statutes provide that, in all cases where exceptions are allowed by law, on the trial of any cause, either party may make such exception at the time the decision complained of is made; or, if such exception be to the charge given to the jury, it shall be made before the jury shall have delivered their verdict. 2 R. S. 422 (440), § 73.

The statute and the decisions of the court require that an objection, to be available, shall be taken at the first opportunity, and

Exception, when taken — By whom taken.

that the exception must be taken immediately upon the overruling of the objection. *Griggs v. Howe*, 31 Barb. 100; 3 Keyes, 166; 2 id. 574. And it is a well-settled rule that an objection, not taken in the court below, cannot be raised for the first time on appeal, provided the objection, if taken below, could have been obviated. *Levin v. Russell*, 42 N. Y. (3 Hand) 251; *Buffalo & N. Y. R. R. Co. v. Brainard*, 9 N. Y. (5 Seld.) 100; *Brookman v. Hamill*, 54 Barb. 209; *Meyer v. Fiegel*, 7 Rob. 122; S. C., 34 How. 434; 38 id. 424; *Rosebrooks v. Dinsmore*, 36 id. 138; S. C., 5 Abb. N. S. 59; 1 Trans. App. 265. But where the objection, if taken below, could not have been obviated, an omission to take it there does not prevent a party from subsequently raising it upon appeal. *Ib.*

An objection to the reception of incompetent evidence must be raised as soon as it is offered; and if a party allows such evidence to be taken without objection, a denial of a motion to strike it out, when the party finds it prejudicial to his cause, will not be a ground for exception. *Levin v. Russell*, 42 N. Y. (3 Hand) 251; *Cheesebrough v. Taylor*, 12 Abb. 227. To this rule there is one exception. If the incompetency of the evidence is not apparent at the time it is offered, the party may take his objection afterward, if this is done as soon as the fact of incompetency is discovered, by motion to strike out the testimony given. See *Heely v. Barnes*, 4 Denio, 73; *Mitchell v. Roulstone*, 2 Hall, 351.

An exception to the judge's charge should be made immediately upon its delivery, and in all cases must be made before the jury have delivered their verdict. 2 R. S. 422 (440), § 73; *Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. 31.

e. By whom taken. Where there are several plaintiffs or defendants, and a decision is made by the court which is prejudicial to one or more of them, but not to all, the exception must be taken by the party or parties aggrieved only.

Thus, where testimony is offered on the trial, which is relevant as to one of two defendants, but irrelevant as to the other, it must be objected to by the latter only. *Black v. Foster*, 28 Barb. 387; S. C., 7 Abb. 406. If in such case the defendants except jointly, the exception will be properly overruled. *Ib.*

f. Form of. All objections to the decision of the court upon the trial are taken verbally. Exceptions, however, must be in

Form of exception — Must be specific.

writing, but the court may allow a reasonable time to settle and reduce the same to form. 2 R. S. 422 (440), § 74.

Whenever an objection or exception is taken, it should be accompanied with a statement of the grounds upon which it is based; and if no such statement is made the objection will be unavailing. *Fountain v. Pettee*, 38 N. Y. (11 Tiff.) 184; S. C., 6 Trans. App. 241; *Valton v. National Fund Life Assurance Co.*, 20 N. Y. (6 Smith) 32; *Mabbett v. White*, 12 N. Y. (2 Kern.) 442; *Cayuga County Bank v. Warden*, 6 N. Y. (2 Seld.) 19; *Cowperthwaite v. Sheffield*, 3 N. Y. (3 Comst.) 243; *Ayrault v. Pacific Bank*, 47 N. Y. (2 Sick.) 570. And where the objection is accompanied by a statement of the ground upon which it is based, no other ground of objection will be listened to on appeal. *Newton v. Harris*, 6 N. Y. (2 Seld.) 345; S. C., 1 Code R. N. S. 414; *Durgin v. Ireland*, 14 N. Y. (4 Kern.) 322; *Blossom v. Barrett*, 37 N. Y. (10 Tiff.) 434; S. C., 5 Trans. App. 36; *Dunham v. Simmons*, 3 Hill, 609; *Harris v. Panama R. R. Co.*, 5 Bosw. 312.

g. Must be specific. The exceptions taken to the charge of a judge must be specific, and present the very point to be raised. The office of an exception is to point out some specific error in law, and the counsel should, by his exception, lay his finger upon the precise request refused, or the error in the charge, not only that the court may, upon the error being pointed out, correct it, but also that the court of review may not be left to spell out and dig up errors which, after they are discovered, may be more apparent than real, and may have arisen from mere inadvertence, or a misapprehension upon the trial. And, where various requests are made to the court to charge, an exception to the refusal of the court to charge each of the requests submitted, except so far as embraced in the charge already delivered, and an exception to every part of the charge inconsistent with such requests, presents no question for review on appeal. *Ayrault v. Pacific Bank*, 47 N. Y. (2 Sick.) 570; *Walsh v. Kelly*, 40 N. Y. (1 Hand) 556; *Requa v. City of Rochester*, 45 N. Y. (6 Hand) 129; *Chamberlain v. Pratt*, 33 N. Y. (6 Tiff.) 47; *Magee v. Badger*, 34 N. Y. (7 Tiff.) 247.

Where a charge contains several distinct propositions, and exception is taken to the charge generally, if either proposition be sound and correct the exception will be unavailing. *Kluender v. Lynch*, 4 Keyes, 361; *Decker v. Mathews*, 12 N. Y. (2 Kern.)

Exceptions must be specific — Exceptions, how cured.

313; *Howland v. Willetts*, 9 N. Y. (5 Seld.) 170; *Hunt v. Maybee*, 7 N. Y. (3 Seld.) 266; *Hart v. Rensselaer & Saratoga R. R. Co.*, 8 N. Y. (4 Seld.) 37; *Haggart v. Morgan*, 5 N. Y. (1 Seld.) 422. The same rule applies where the exception is to the whole charge and every part of it. *Kluender v. Lynch*, 4 Keyes, 361; *Caldwell v. Murphy*, 11 N. Y. (1 Kern.) 416; *Jones v. Osgood*, 6 N. Y. (2 Seld.) 233. And the same rule applies to an exception to each and every part of a charge. *Caldwell v. Murphy*, 11 N. Y. (1 Kern.) 416; *Kluender v. Lynch*, 4 Keyes, 361. But in excepting to a charge, all that is necessary is to specify the legal proposition therein supposed to be objectionable; and if the whole charge consists of but a single proposition, a general exception thereto will be sufficient, without a statement why the charge is, or is supposed to be, erroneous. *Requa v. Holmes*, 16 N. Y. (2 Smith) 193.

The same rules apply to exceptions to the admission of evidence. A general exception to the admission of evidence of a series of facts is unavailing, if evidence of one of the facts is admissible. *Day v. Roth*, 18 N. Y. (4 Smith) 448; *Graham v. Dunigan*, 2 Bosw. 516. And where an exception to evidence is so general in its character as not to indicate the particular ground on which it was made, the exception will be unavailing, unless the character of the objection was such that it could not have been obviated on the trial had it been specifically pointed out. *Merritt v. Seaman*, 6 N. Y. (2 Seld.) 168.

So an exception to the allowance of a specified sum as interest will be unavailing if any interest is allowable. *McMahon v. N. Y. & Erie R. R. Co.*, 20 N. Y. (6 Smith) 463; *Graham v. Chrystal*, 37 How. 279; S. C., 2 Keyes, 21.

h. Exceptions, how cured. A defect in the proof or proceedings on a trial, to which an exception has been properly taken, may be cured by subsequent proceedings, and the exception rendered unavailing.

Thus, where a valid exception is taken to the insufficiency of the proof of a given fact, the exception will be cured by the introduction of further evidence supplying the defect. *Bronson v. Wiman*, 10 Barb. 406; *Westlake v. St. Lawrence Mutual Ins. Co.*, 14 id. 206; *De Groot v. Fulton Fire Ins. Co.*, 4 Rob. 504; *McCotter v. Hooker*, 8 N. Y. (4 Seld.) 497; *Hyland v. Sherman*, 2 E. D. Smith, 234; *Colegrove v. Harlem & New Haven R. R. Co.*, 6 Duer, 382; *Lambert v. Seely*, 2 Hilt. 429; S. C.,

 Exceptions, how cured — Bill of exceptions — Reserving cause for judgment.

17 How. 432; *Kent v. Harcourt*, 33 Barb. 491. But an exception to the erroneous admission of evidence will not be waived, although the party objecting afterward introduces evidence tending to establish the same fact. *Worrall v. Parmelee*, 1 N. Y. (1 Comst.) 519. See *Hayden v. Palmer*, 2 Hill, 205; *Grimm v. Hamel*, 2 Hilt. 434; *Tooker v. Gormer*, id. 71. So a party will not lose the benefit of an exception to the admission of improper testimony, by simply cross-examining the witness giving it. *Duff v. Lyon*, 1 E. D. Smith, 536. And if on a cross-examination a witness gives testimony which is objected to as inadmissible under the pleadings and secondary in its character, the objection will not be waived by re-examining the witness in respect to the matters embraced in the testimony thus received under objection. *Simpson v. Watrus*, 3 Hill, 619.

But a party may expressly waive an objection to the admission of improper evidence. *Rundell v. Butler*, 10 Wend. 119. And an exception to the admission of such evidence may be rendered nugatory by a subsequent direction to the jury to disregard it. *People v. Parish*, 4 Denio, 153; *Williams v. Vanderbilt*, 29 Barb. 491; *Chester v. Dickerson*, 52 id. 349. But a direction to the jury to disregard evidence improperly admitted will not have that effect unless it can be clearly shown that the verdict was not affected by the evidence so admitted. *Erben v. Lorillard*, 19 N. Y. (5 Smith) 299.

i. Bill of exceptions. The directions as to the form, contents and preparation of a bill of exceptions will be given in a subsequent chapter. See New Trials, in a subsequent chapter; Code, § 264; Rules 41-44, Sup. Ct.

Section 34. Reserving cause for judgment.

a. In general. The Code directs that, upon receiving a verdict, the clerk shall make an entry in his minutes specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon, or an order that the cause be reserved for argument or further consideration. Code, § 264.

The Code also declares that, if a different direction be not given by the court, the clerk must enter judgment in conformity to the verdict. *Ib.* Requiring a jury to pass upon specific questions of fact, is such a different direction as will prevent the clerk from entering the judgment in accordance with a general verdict, as he cannot determine what judgment is to be entered.

Reserving cause for argument — Reserving exceptions.

Moss v. Priest, 1 Rob. 632 ; S. C., 19 Abb. 314. In such cases, a special application for judgment becomes necessary, and on the argument of the motion the court has an opportunity to give a fuller examination of the questions presented than would be the case if the questions were presented for immediate decision during the haste of the circuit. The practice in such cases has been already noticed. See pp. 198 to 201, *ante*.

b. Reserving cause for argument. The Code provides that a motion for a new trial, on a case or exceptions, or otherwise, and an application for judgment on a special verdict, or case reserved for argument or further consideration, must in the first instance be heard and decided at the circuit or special term, except that when exceptions are taken, the judge trying the cause may, at the trial, direct them to be heard in the first instance at the general term. Code, § 265.

The Code in allowing the judge at the circuit to reserve a cause for argument evidently contemplated those cases in which the court might be undecided as to what judgment should be rendered on the verdict, and where it would facilitate substantial justice between the parties to allow a postponement of the decision until the court on a careful consideration of the questions presented, and after a full argument by the counsel respectively, had arrived at a well-considered determination, without unnecessarily delaying the other business of the circuit. Under the general language of the Code the argument might undoubtedly be heard at special term ; but it is to be presumed that it was the intention of the framers of the Code that the court should merely postpone the argument to a more convenient day at the circuit, when the cause could be taken up and disposed of in the same manner as the proceedings are resumed in the trial of a long cause after adjournment from day to day. If this view is correct, the court will fix the date of the argument when directing the postponement, without requiring either party to give formal notice of the application for judgment.

c. Reserving exceptions. The Code provides that when exceptions are taken, the judge trying the cause may, at the trial, direct them to be heard in the first instance at the general term, and that the judgment be in the mean time suspended ; and in that case they must be there heard in the first instance and judgment there given. Code, § 265.

There are but two cases in which the general term can, before

Reserving exceptions.

judgment, and in the first instance, review the proceedings. One is, where the judge trying the cause directs the exceptions of the unsuccessful party to be heard, in the first instance, at the general term; the other, where there are no exceptions taken upon the progress of the trial upon any question of evidence, and the facts are uncontroverted. *Purchase v. Matteson*, 25 N. Y. (11 Smith) 211; S. C., 25 How. 161; 15 Abb. 402. In the former case, the general term either grants a new trial or renders judgment. In the latter case, it renders final judgment in favor of either party who, upon the conceded state of facts, is entitled to it. *Dickerson v. Wason*, 48 Barb. 412.

A judge at the circuit has no power to order a whole case to be heard at general term, but can order the exceptions only to be so heard. *Cronk v. Canfield*, 31 Barb. 171; *Hoxie v. Green*, 37 How. 97. Upon such hearing no findings of fact, however erroneous, can be reviewed by the general term, nor can the point be raised that the verdict is against the weight of evidence. *Dickerson v. Wason*, 48 Barb. 412; *Hotchkins v. Hodge*, 38 id. 117. See *Crouch v. Parker*, 40 id. 94; *Mason v. Breslin*, 2 Sweeny, 386; S. C., 9 Abb. N. S. 427; 40 How. 436.

But whenever exceptions have been taken, and questions of law thereby raised, even though the only exception taken was to a dismissal of the complaint, the circuit judge has power to direct such exception or exceptions to be heard in the first instance at the general term. *Lake v. Artisans' Bank*, 3 Abb. N. S. 209; S. C., 1 Trans. App. 71; 3 Keyes, 276; *Huntingdon v. Claffin*, 38 N. Y. (11 Tiff.) 182; S. C., 6 Trans. App. 168.

The application for judgment at the general term is an enumerated motion, and must be noticed for the first day of the term. Rules 47, 49, Sup. Ct. Either party may notice the cause for the hearing. Ib. The moving party must give the usual notice, file a note of issue, and serve upon the adverse party the necessary papers. See Rules 46, 48, 49, Sup. Ct. He must also prepare the necessary papers for the court as directed by rule 52, supreme court. The cause being called in its order on the calendar, the moving party is entitled to begin. After hearing the argument the court renders its decision, which may be either for judgment on the verdict, or for a new trial. *Dickerson v. Wason*, 48 Barb. 112; *Mason v. Breslin*, 2 Sweeny, 386; S. C., 9 Abb. N. S. 427; 40 How. 436.

Reserving for consideration — Stay of proceedings.

d. Reserving for consideration. The Code allows the judge at circuit to reserve the cause for consideration, without hearing further argument. Code, § 264. In such cases the judge makes his decision at his convenience, and directs the clerk to enter judgment in accordance therewith.

Section 35. Stay of proceedings.

a. In general. Whenever the unsuccessful party proposes to move for a new trial, he should, on the rendition of the verdict, move the court for such time as may be necessary to make a case or exceptions, and for a stay of proceedings pending the decision of the motion. If the motion for the stay is delayed until the court has adjourned, the application, if granted by the judge out of court, cannot be for a longer period than twenty days. Code, § 401.

In moving for additional time to make and serve a case and exceptions, care should be taken to include in the application a request for a stay of proceedings, as an order directing that the time to make and serve a case and exceptions be extended will not, of itself, operate as a stay. *Goodrich v. Downs*, 5 Hill, 510. See *Oakley v. Aspinwall*, 1 Sandf. 694.

Section 36. Discretionary powers of court.

a. In general. During the entire progress of the trial, from the calling of the cause until the entry of the verdict, there are certain questions liable to arise which are within the discretion of the court, and to the determination of which no valid exception can be taken. As such questions could not, from this fact, affect any *right* of either party upon the trial, and consequently do not form a part of the plan of a discussion of a trial by jury, it was deemed advisable to discuss some of the most important discretionary powers of the court in a separate section, even though the matter so introduced might seem misplaced.

It is within the discretion of the court to allow parties to introduce further testimony after the counsel have rested the cause. *Berger v. White*, 2 Bosw. 92; *Williams v. Hayes*, 20 N. Y. (6 Smith) 58; *Dunckle v. Kocker*, 11 Barb. 387; *Heidenheimer v. Wilson*, 31 id. 636; *Anthony v. Smith*, 4 Bosw. 503. Or after the cause has been summed up to the jury. *Meyer v. Goedel*, 31 How. 456. Or to refuse such allowance. *Chancel v. Barclay*, 1 E. D. Smith, 384. So it is a matter entirely in the discretion of the court whether a plaintiff shall be permitted to give

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additional evidence after a motion for a nonsuit. *Reed v. Barber*, 3 Code R. 160.

The court may, in its discretion, allow or refuse to allow a witness to be recalled after he has left the stand. *Sheldon v. Wood*, 2 Bosw. 267; *Treadwell v. Stebbins*, 6 id. 538; *Stacy v. Graham*, 3 Duer, 444; *Romertze v. East River Bank*, 2 Sweeny, 82. So it may allow or refuse to allow leading questions to be put. *Cheaney v. Arnold*, 18 Barb. 435; *Budlong v. Van Nostrand*, 24 id. 25; *Vrooman v. Griffiths*, 1 Keyes, 53. Or determine whether a question is objectionable as leading. *Walker v. Dunsbaugh*, 20 N. Y. (6 Smith) 170. So the nature and extent of the questions that may properly be put to a witness by way of cross-examination, depend largely upon judicial discretion. *Fry v. Bennett*, 3 Bosw. 200; S. C., 9 Abb. 45; *Great Western Turnpike Co. v. Loomis*, 32 N. Y. (5 Tiff.) 127; *Greton v. Smith*, 33 N. Y. (6 Tiff.) 245; *La Beau v. People*, 34 N. Y. (7 Tiff.) 223.

The court may also limit the number of witnesses examined on a collateral issue. *Antony v. Smith*, 4 Bosw. 503; *Ward v. Washington Ins. Co.*, 6 id. 229. *Ante*, 125, 126.

The refusal to receive a demurrer to evidence is a matter of discretion. *Colgrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. (6 Smith) 492. So is the question which party shall open and close the case. *Fry v. Bennett*, 28 N. Y. (1 Tiff.) 324. *Ante*, 111 to 114.

So in an equity case, the submission to the jury of additional issues arising on the proofs and material to the final determination is within the discretion of the court. *Farmers and Mechanics' Bank v. Joslyn*, 37 N. Y. (10 Tiff.) 353; S. C., 4 Trans. App. 308.

To the exercise of these and other discretionary powers of the court, no exception will lie, except in a clear case of abuse.

CHAPTER III.

TRIAL OF ISSUES OF FACT BY THE COURT.

ARTICLE I.

PROCEEDINGS ON THE TRIAL.

Section 1. What actions or issues are properly so triable.

a. Equitable actions. It has already been stated (*ante*, 10) that an issue of fact in any action, formerly known as a common-law action, must be tried by a jury, unless a jury trial be waived, or a reference be ordered under the provisions of the Code. See Code, § 253. Every other issue is, however, properly triable by the court without a jury. Code, § 254. And this provision of the Code includes, generally, all issues of fact in equitable actions, a party not being entitled, as a matter of right, to have the issues of fact in such actions tried by a jury. *McCarty v. Edwards*, 24 How. 236. And where the action really seeks for equitable relief, although in form it be one for the recovery of money only, it should be tried by the court. *Cheseborough v. House*, 5 Duer, 125. See *Hill v. McCarthy*, 3 Code R. 49. So where the complaint sets forth a cause of action entitling the plaintiff to legal relief only, and demands equitable relief, either with or without legal relief, the defendant cannot object, on appeal, that the cause was tried by the court alone, and that legal relief was given, unless the objection was seasonably taken in the court below. *Pennsylvania Coal Co. v. Delaware & Hudson Canal Co.*, 1 Keyes, 72; *Barlow v. Scott*, 24 N. Y. (10 Smith) 40; *Greason v. Keteltas*, 17 N. Y. (3 Smith) 491; *The People v. Albany & Susquehanna R. R. Co.*, 5 Lans. 25. See *Bradley v. Aldrich*, 40 N. Y. (1 Hand) 504; *McKeon v. See*, 4 Rob. 449.

b. Actions which might be referred. Issues in actions which might be referred are also triable by the court, unless the parties, by uniting in a consent to a reference, as provided in section 270, require that the action shall be tried by a referee. Code, § 254.

c. Actions not usually tried by jury. Actions strictly equitable in their nature are not usually tried by a jury, owing to the

When jury trial necessary — Waiver of trial by jury — Failing to appear.

difficulty which a jury would have in adequately dealing with the complicated questions arising for settlement. Issues in an equitable action may, however, be specially prepared by the judge and submitted to a jury for their decision, and this has been done where the controversy was strictly equitable in its nature. See *Wood v. Harrison*, 2 Sandf. 665; S. C., 2 Code R. 141. See *ante*, 18, 19, 20 to 24.

d. When jury trial necessary. A trial by jury is necessary in every case, where the facts, as they exist at the commencement of the action, are such that the court has no power to award any special or equitable relief. *Stevenson v. Buxton*, 15 Abb. 352; S. C., 37 Barb. 13; *Lewis v. Varnum*, 12 Abb. 305; *Bradley v. Aldrich*, 40 N. Y. (1 Hand) 504. But the demand to send the cause to the jury should be made by the defendant before the trial is entered upon by the court. *Greason v. Keteltas*, 17 N. Y. (3 Smith) 491. See *Crouse v. Walrath*, 41 How. 86. *Ante*, p. 11, 12.

Section 2. Waiver of trial by jury.

a. Right to waive jury. Although the right to a trial by jury in a proper case is absolute, yet this right may be waived. Thus, by section 266 of the Code, it is provided, that "trial by jury may be waived by the several parties to an issue of fact in actions on contract, and with the assent of the court, in other actions, in the manner following:

1. By failing to appear at the trial. 2. By written consent, in person or by attorney, filed with the clerk. 3. By oral consent in open court, entered in the minutes." So, if a party enters voluntarily upon a trial by the court, without objection, in a case where he would be entitled to a trial by jury, he will ordinarily be understood as waiving the latter mode of trial. *Greason v. Keteltas*, 17 N. Y. (3 Smith) 491; *Moffat v. Mount*, 17 Abb. 4; S. C., 10 Bosw. 468; *McKeon v. See*, 4 Rob. 449. And he cannot, on appeal, object that the cause was tried by the court without a jury. *Pennsylvania Coal Co. v. Delaware & Hudson Canal Co.*, 1 Keyes, 72. *Ante*, 11, 12.

b. Failing to appear. The above section of the Code (266), which provides for a waiver, must be construed to mean a waiver which implies a voluntary relinquishment of a right, not the enforcement of one, and by *all* the parties, not by any one alone, unless the other seeks to avail himself of it. Hence, a trial by jury is not waived by the mere failure of *one* of the parties to

appear at the trial under subdivision 1, section 266 of the Code. *Hendricks v. Carpenter*, 4 Rob. 665; affirming S. C., 2 id. 625; 1 Abb. N. S. 213.

Where the defendant does not appear in a cause, the plaintiff may waive a jury, and take an inquest before the court at the circuit, and out of its regular order on the calendar. *Haines v. Davis*, 6 How. 118; S. C., 1 Code R. N. S. 407. See *Goodyear v. Baird*, 11 How. 377. But it seems that this should be done before the jury are discharged for the circuit. *Haines v. Davis*, 1 Code R. N. S. 407; S. C., 6 How. 118. See, however, *Dickinson v. Kimball*, 1 Code R. 83. *Ante*, 53 to 61.

c. Written consent. Where the waiver of a trial by jury is by written consent, it is important that the attorney should see that it be properly filed with the clerk, as provided by the Code in section 266, subdivision 2. This consent should be filed before the trial takes place, and the cause should be noticed and placed upon the special term calendar, so that it may be tried in its order by the court.

d. Oral consent. When the waiver is made by an oral consent in open court, the attorney should see that such consent is duly entered upon the minutes. See Code, § 266, subd. 3.

e. What is a waiver. Where the cause is one primarily triable by a jury, the waiver should be clearly established, or the trial by the court may be ineffectual. See *Salters v. Genin*, 7 Abb. 193; S. C., 3 Bosw. 250. It hence becomes important to clearly understand what will amount to a waiver. To wait until the trial is entered upon, before making application for a jury trial, is held to be a waiver. *McKeon v. See*, 4 Rob. 449. *Ante*, 11, 12. And it is settled that, where a legal cause of action is joined with an equitable one, and the trial of the latter has been entered upon, but there is a failure of evidence to sustain it, the court must still proceed with the trial of the former, even without a jury. *New York Ice Co. v. North West. Ins. Co.*, 23 N. Y. (9 Smith) 357; S. C., 21 How. 296; 12 Abb. 414; *Barlow v. Scott*, 24 N. Y. (10 Smith) 40; *Penn. Coal Co. v. Del. & Hudson Canal Co.*, 1 Keyes, 72. See *Bradley v. Aldrich*, 40 N. Y. (1 Hand) 504. This rule is based upon the principle that, as one of the issues was triable without a jury, the entering upon its trial without a previous application, under section 254 of the Code, was a waiver of a jury, there being no provision in the Code for two trials of

issues in an action, at the mere election of the party, without the sanction of the court. See *McKeon v. See*, 4 Rob. 449.

f. What is not a waiver. We have already seen (*ante*, p. 11, 12) that the failure of one of the parties to appear at the trial is not a waiver of a jury trial. So, where a defendant excepts to the finding of facts, and to the conclusions of law by a judge, he does not thereby waive the right to a trial by jury. Nor is he estopped, on appeal, from taking the ground that the trial by the judge at chambers was irregular. *Fasnacht v. Stehn*, 5 Abb. N. S. 338; S. C., 53 Barb. 650.

Section 3. Bringing on the trial.

a. In general. The trial of an issue of fact, by the court may be brought on upon the motion of either party giving the notice. It cannot be moved, however, until the cause is in readiness for trial as between all the parties to the action; for it cannot be tried in *sections* without leave of the court, which is granted only in certain cases. If there be several defendants, who are each entitled to notice of trial, all must have notice from the plaintiff before he can move on the trial. On the other hand, all the defendants must have given notice of trial to the plaintiff before any of them can move the trial as against the plaintiff. *Ward v. Dewey*, 12 How. 193; *Morris v. Crawford*, 16 Abb. 124. See *Fassett v. Tallmadge*, 15 Abb. 205; *Good-year v. Brooks*, 2 Abb. N. S. 296; S. C., 4 Rob. 682. *Ante*, 4, 28.

b. Practice on the trial. The practice, or course of procedure on a trial by the court, is in general the same as upon a trial by jury, the rules and principles of which have been fully stated and explained in previous chapters. See *ante*, 125, etc. Greater latitude is allowed by the court, in regard to the formalities of the trial, and a wider discretion is exercised in permitting parties to recall witnesses and supply proofs, than on a trial before a jury. 1 Van Sant. Eq. Pr. 479.

The trial must be entire, and cannot properly be had before several judges, in succession; as for example, partly decided by one judge, and at a subsequent term taken up and completed by another. A cause cannot thus be tried and determined by piecemeal. *Chamberlain v. Dempsey*, 15 Abb. 1; S. C., 9 Bosw. 540; *Belmont v. Bouver*, 3 Rob. 693; S. C. affirmed, *id.* 698, note. If it is desired, by either party, to have the judge before whom the cause is tried pass upon any issue not made by the pleadings, he should be specially requested to do so on the

trial, before the decision; or the matter may be brought up by motion, on the subsequent settlement of a case. *Heroy v. Kerr*, 21 How. 409; S. C. affirmed, 2 Keyes, 582.

Section 4. The decision.

a. In general. The decision of the judge upon the trial of a question of fact by the court, though not itself a judgment, is the only authority for entering the judgment, and without it the latter would be irregular and altogether invalid. *Chamberlain v. Dempsey*, 14 Abb. 241; S. C., 9 Bosw. 212; *Otis v. Spencer*, 16 N. Y. (2 Smith) 610; S. C., 15 How. 425; 6 Abb. 127. In all cases the clerk must enter judgment thereon in the judgment book, but he cannot go beyond the decision, and include any thing in the judgment not embraced in the decision. *Loeschigk v. Addison*, 19 Abb. 169; S. C., 3 Rob. 331; *Sherman v. Postley*, 45 Barb. 348. Such an entry in the judgment book, and a copy of it in the roll is the only record evidence that a judgment has been perfected. *Schenectady & Saratoga Plank Road Co. v. Thatcher*, 6 How. 226; S. C., 1 Code R. N. S. 380; *Sherman v. Postley*, 45 Barb. 348.

b. What to be decided. Prior to the amendment of section 267 of the Code in 1860, it was held to be sufficient if the decision of the judge stated in general terms what the judgment ought to be, without any finding of facts, or statement of conclusions of law. See *Johnson v. Whillock*, 13 N. Y. (3 Kern.) 344; *Otis v. Spencer*, 16 N. Y. (2 Smith) 610; S. C., 15 How. 425; 6 Abb. 127. But now, it is expressly provided, that the decision of the court "must contain a statement of the facts found, and the conclusions of law separately." Code, § 267; *Van Slyke v. Hyatt*, 46 N. Y. (1 Sick.) 259. All the *material* facts upon which the judgment of the court is based should be found by the decision, and it should dispose of all the issues between all the parties. In case the decision does not so dispose of all the issues, a new trial must be ordered. See *Loeschigk v. Addison*, 19 Abb. 169; S. C., 3 Rob. 331; *Chamberlain v. Dempsey*, 14 Abb. 241; S. C., 9 Bosw. 212; *Griffin v. Cranston*, 5 id. 658; *Burger v. Baker*, 4 Abb. 11; *Rogers v. Baird*, 20 How. 98, 282; *Sinclair v. Tallmadge*, 35 Barb. 602.

The decision is required to be made in writing (Code, § 267), and it must be signed by the judge who tried the cause, and appear by his signature or *allocatur*. *Thomas v. Tanner*, 14 How. 426. See *Burger v. Baker*, 4 Abb. 11.

Form of decision.

(*Title of cause.*)

(*At, etc.*)

This action having been brought to trial before the court, without a jury, the court finds the following facts :

I.

II.

III.

And the following conclusions of law thereupon :

I.

II.

III.

Judgment is therefore rendered for , in the sum of , with costs.

J. P.,

Justice, etc.

c. How to be decided. The judge must himself render the decision. He cannot, after the hearing before himself, order the cause to be re-tried before a jury. *O'Brien v. Bowes*, 10 Abb. 106; S. C., 4 Bosw. 657. Nor has any other judge power to interfere in the decision of the cause, even to order a reference to take an accounting (*Chamberlain v. Dempsey*, 14 Abb. 241; S. C., 9 Bosw. 212), though this might properly be done by the judge who tried the cause. Code, § 271. So, the judge must make a decision disposing of the entire case. *Van Valen v. Lapham*, 13 How. 240; S. C. affirmed, 5 Duer, 689. He must determine the issues tried by him absolutely, and cannot render a decision subject to the opinion of the general term; a proceeding applicable exclusively to trials by jury. *Mallory v. Wood*, 14 How. 67; S. C., 3 Abb. 369; 6 Duer, 657. And the decision should be made, as such, a mere *opinion* being insufficient for the purpose. *Thomas v. Tanner*, 14 How. 426. See *Magie v. Baker*, 14 N. Y. (4 Kern.) 435.

d. Effect of decision. The decision of a judge, who hears the trial of a cause before him, on a question of fact, is equivalent to the verdict of a jury, and is conclusive, if there is any evidence to sustain it, or unless it be so clearly against the weight of evidence that a verdict under similar circumstances would be set aside. *Ritter v. Oushman*, 35 How. 286; S. C., 7 Rob. 294; *Bruyn v. Comstock*, 56 Barb. 9; *Bank of North America v. Embury*, 21 How. 14; S. C., 33 Barb. 323. See, also, *Davis v. Allen*, 3 N. Y. (3 Comst.) 168; *Hoogland v. Wight*, 7 Bosw. 394; S. C., 20 How. 70.

Every reasonable inference will be made in favor of the decision. See *Viele v. The Troy & Boston R. R. Co.*, 20 N. Y. (6 Smith) 184. And the finding of the judge, upon conflicting evidence, will not be disturbed by an appellate court. *Footte v. Roberts*, 7 Rob. 17. See, also, *Woodruff v. McGrath*, 32 N. Y. (5 Tiff.) 255; *Bearss v. Copley*, 10 N. Y. (6 Seld.) 93; *Hall v. Morrison*, 3 Bosw. 520.

e. When to be rendered. The decision is required to be made within twenty days after the court at which the trial took place. Code, § 267. This provision, as regards the time, is, however, generally regarded merely as directory, and a decision made after the prescribed period is perfectly valid. *Stewart v. Slater*, 6 Duer, 83; *Burger v. Baker*, 4 Abb. 11; *The People v. Dodge*, 5 How. 47. See *Heroy v. Kerr*, 21 id. 409; S. C., 8 Bosw. 194. If no decision is rendered before the expiration of the judge's term of office, the whole trial falls through, and a trial of the issues must be commenced anew. *Putnam v. Crombie*, 34 Barb. 232.

If, upon motion by either party to a general or special term of the court, it shall be made to appear that the decision is unreasonably delayed, the court may make an order absolute for a new trial, or may order a new trial, unless the decision shall be filed by a time to be specified in the order. Code, § 267.

f. Statement of facts found. We have already seen (*ante*, subd. *b*) that section 267 of the Code requires the decision of the court to "contain a statement of the facts found, and the conclusions of law, separately." This should be a finding on all the facts sufficient to clearly designate the nature and form of the judgment to be entered, and to fully determine the rights of the parties. No fact is or can be implied from the conclusions of law; they follow as the result of the facts separately stated. *Tomlinson v. Mayor, etc., of New York*, 23 How. 452.

Though all the *material* facts should be found in the decision, it will not be more erroneous for the court to omit to state even facts material to the issue, than for a jury to make such omissions in its verdict; the presumption of law being that its findings on such facts are favorable to the successful party, as every thing necessary to sustain the verdict will be intended. *McKeon v. See*, 4 Rob. 449. See *Loomis v. Decker*, 1 Daly, 186; *Rider v. Powell*, 28 N. Y. (1 Tiff.) 310. Where the judge finds a material fact, wholly without evidence to sustain it, it is an

error of law, and, upon exception thereto, it is reviewable in the court of appeals. *Mason v. Lord*, 40 N. Y. (1 Hand) 476. See *Putnam v. Hubbell*, 42 N. Y. (3 Hand) 106; *Root v. Great Western R. R. Co.*, 45 N. Y. (6 Hand) 524. And, it would seem that the rule is the same where there has been a refusal to find a material fact which is proved by uncontroverted evidence. *Mason v. Lord*, 40 N. Y. (1 Hand) 476.

g. Statement of conclusions of law. The conclusions of law arrived at by the judge and his findings of facts are to be stated separately. See Code, § 267.

h. Preparing and settling decision. The judge may, of course, prepare his decision himself, but it is almost always drawn up by the attorney for the successful party. It would, however, be highly improper for the counsel for the defeated party to be present at the finding of facts by the judge who tried the cause, or to have any voice in saying what those findings should be. The fact that the judge allows the successful party to be present does not give the other party a right to be present also. *People v. Albany & Susquehanna R. R. Co.*, 8 Abb. N. S. 122; S. C., 39 How. 49; S. C. affirmed, 57 Barb. 204; 2 Lans. 459. Neither is the successful party required, unless by express direction or special agreement, to submit a draft of the judgment, before entry thereof, to the adverse party, or to have it settled upon notice. *Ib.*

It is, however, very usual in practice for the prevailing party to draft what he conceives to be the finding of the judge upon the facts, and his conclusions of law, and submit it to his opponent, who, if dissatisfied, may either propose amendments or prepare what he conceives to be the finding, and submit the same to the judge for settlement; or, the parties may go before the judge, in an informal manner, and obtain a settlement of the decision. See 1 Van Sant. Eq. Pr. 483.

i. Filing. The decision should be filed with the clerk, within twenty days after the court at which the trial took place. § 267. But where there is no pretense of merits, or that the action was not correctly decided, the omission to file a decision in writing is not a defect which can "affect the substantial rights of the adverse party," and should be disregarded. *Lewis v. Jones*, 13 Abb. 427. See Code, § 176. So, where a motion is made to set aside a judgment for irregularity in this respect, it must clearly appear on the moving papers, that no decision has in fact been

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The judgment—Reserving cause for judgment.

filed, for it should be presumed that the judge who tried the cause did his duty. *Lewis v. Jones*, 13 Abb. 427.

It is not unusual in practice for the judge to deliver his decision personally to the attorney for the successful party, to be filed; and sometimes, when the justice is in one place, the attorney for the successful party in another, and the clerk's office in a third, the justice sends his decision, when signed, by mail to the attorney for the successful party, who takes care that it is properly filed. See *The People v. Church*, 2 Lans. 459, 469.

j. The judgment. The only authority needed for entering judgment is the decision of the judge, and the judgment to be entered thereon must contain no provisions not embraced in such decision. *Loeschigk v. Addison*, 19 Abb. 189; S. C., 3 Rob. 331. See *ante*, subd. *a*.

Nor is it necessary to recite in the judgment the particulars of the decision; and on appeal a portion of the recitals in the judgment may be stricken out. *Bunten v. Oriental Mut. Ins. Co.*, 8 Bosw. 448; S. C. affirmed, 2 Keyes, 667.

Prior to the amendment of section 267 of the Code, in 1870, it was the duty of the clerk, unless otherwise directed by the court, to enter judgment at once on the filing of the decision, and the successful party might cause it to be done. *Cotes v. Smith*, 29 How. 326; S. C. affirmed, 31 id. 146, 638, *n*. The omission of the clerk to enter judgment was not allowed to prejudice the party. *Butler v. Lee*, 33 How. 251; S. C., 3 Keyes, 70. See *People v. Albany & Susquehanna R. R. Co.*, 57 Barb. 209.

The amendment of 1870 to section 267 of the Code, provides that, in cases of trial by the court, "judgment upon the decision shall be entered accordingly four days thereafter." See Code, § 267.

k. Reserving cause for judgment. After the court has rendered a final decision, it has no power to suspend the entry of judgment (*Wright v. Delafield*, 11 How. 465; *Mallory v. Wood*, 14 id. 67; S. C., 3 Abb. 369; 6 Duer, 657), but it may reserve the decision itself until such proceedings as are necessary to a final determination of the controversy may be had. Thus, though the general issues in the action are decided, it may be necessary to direct a reference to take an account, or to ascertain some necessary fact not yet presented. Such questions may be sent to a referee for determination, and the final decision on those points reserved. See Code, § 271. See Interlocutory Decrees, Orders, etc.

l. Final hearing. The proceedings on the final hearing of the cause, on further directions upon the coming in of the referee's report, have been fully described in treating of the subject of Interlocutory Decrees, and hence need only be referred to in this place. See Interlocutory or Decretal Orders.

m. Objections and exceptions. Objections and exceptions in trials by the court without a jury are subject to the same rules as in trials by jury; as to which, see *ante*, pp. 202 to 207. Exceptions to decisions of the judge, to which there was no opportunity to except during the course of the trial, are regulated by provisions of the Code, section 268, which will be fully stated and explained in a subsequent section of this work. See *post*, § 5.

So far as questions of law are decided by the judge during the progress of the trial, exceptions must be taken, if at all, at the time the decisions are made. No exception is required at the trial so far as the decision involves the determination of a question of fact upon the evidence. *Tremain v. Rider*, 13 How. 148. See *Hunt v. Bloomer*, 13 N.Y. (3 Kern.) 341; S. C., 12 How. 567; *Magie v. Baker*, 14 N. Y. (4 Kern.) 435.

n. Correcting findings. At the conclusion of the trial of an issue of fact by the court, it is always advisable to make a written statement, in an alternative form of such findings of fact as are deemed material, and to present this statement to the court with a request to find either in one way or the other. If the judge, in his decision, fails to pass upon any or all of the facts as requested, the objection may be taken by an exception to the decision. But if no request to find certain facts has been made on the trial, the party must seek his remedy at the time the case is presented to the judge for settlement. The party desiring to review the decision of a judge on the trial of an issue of fact should, if the decision is final, incorporate in his case a statement of such facts and also of such conclusions of law as he deems necessary to be found in order to protect his rights. The judge will, in that case, pass upon such facts, and find or refuse to find; and, in a proper case, the party may have the benefit of an exception to his refusal. *People v. Church*, 2 Lans. 459; S. C., 57 Barb. 204; Rule 41, Sup. Ct. Any exception thus taken becomes a part of the record, and the materiality of the findings asked for and refused can be determined at the general term, and on appeal to the court of appeals. See *Van*

Slyke v. Hyatt, 46 N. Y. (1 Sick.) 259; *Beck v. Sheldon*, 48 N. Y. (3 Sick.) 365, 369.

It will be improper to move at special term for an order setting aside the judgment entered on the decision, or for an order sending back the case for a re-settlement, as a review of a judgment at special term cannot be had at another special term. See *People v. Church*, 2 Lans. 459; S. C., 57 Barb. 204.

But where the decision of the court is not final, and does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may move for a new trial at the general term, and thus obtain a review of the decision directing the further proceedings. See Code, § 268; *Bolles v. Duff*, 55 Barb. 580. For the purpose of obtaining this review, the moving party may, within ten days after notice that the decision has been filed, except thereto, and make a case or exceptions, as in case of appeal. Code, § 268. For the proceedings on this motion, see New Trials. For the mode of obtaining findings of fact on a trial by referee, see Trial by Referee.

Section 5. Exceptions to decision.

a. In general. It is provided by the Code, that for the purposes of an appeal, either party may except to a decision on a matter of law arising upon a trial by the court, within ten days after notice in writing of the judgment. Code, § 268. The power of thus excepting to the decision of the court, conferred by the Code, is a distinct privilege, granted for the purpose of enabling a party who may consider himself aggrieved, to bring up for revision any errors of law committed by the judge in rendering his decision. See *People v. Albany & Susquehanna R. R. Co.*, 8 Abb. N. S. 122; S. C., 39 How. 49; S. C. affirmed, 2 Lans. 459. And the true nature of this class of exceptions is thus pointed out by the court of appeals: "The exceptions, which may and must be made within ten days after notice of the judgment, are those, and only those, which, under the former practice, were made to the rulings of the court, after the evidence was closed, and before the jury retired. This clause of the section (268) does not authorize exceptions to be taken, after judgment, to matters arising during the trial, and where there is opportunity to except, at the time the adverse decision is made." *Hunt v. Bloomer*, 13 N. Y. (3 Kern.) 341; S. C., 12 How. 567. See, also, *Johnson v. Whitlock*, 12 How. 571; S. C., 13 N. Y. (3 Kern.) 344; *Belknap v. Sealey*, 14 N. Y. (4 Kern.) 143; *Tremain*

v. *Rider*, 13 How. 148. Exceptions to the rulings of the court *on the trial* must be taken, and entered on the judge's minutes when made, and cannot be made afterward. *Ib.*

The exception intended by the Code is to "a decision on a *matter of law* arising upon such trial," and exceptions to findings of fact are unnecessary and unavailing. Such matters are reviewed upon a case, as will be shown hereafter. Exceptions to conclusions of law, where the cause is tried by the court without a jury, are indispensable to raise any question for review. *Enos v. Eigenbrodt*, 32 N. Y. (5 Tiff.) 444; *Weed v. The N. Y. & Harlem R. R. Co.*, 29 N. Y. (2 Tiff.) 616; *Russell v. Duflon*, 4 Lans. 399. In order to be available the exception must be specific. It must be taken to the decision of some definite question of law, properly brought to the notice of the court. *Walsh v. Washington Marine Ins. Co.*, 32 N. Y. (5 Tiff.) 427. If no ground is stated for the exception, it will always be disregarded. *Renaud v. Peck*, 2 Hilt. 137; *Elwell v. Dodge*, 33 Barb. 336; *Valton v. National Fund Life Assurance Co.*, 20 N. Y. (6 Smith) 32. See *Newlin v. Lyon*, 49 N. Y. (4 Sick.) 661. See *New Trials*.

b. *Case or exceptions.* Either party desiring a review upon the evidence appearing on the trial, either of the questions of fact or of law, may, at any time within ten days after notice of judgment, or within such time as may be prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except that the judge, in settling the case, must briefly specify the facts found by him and his conclusions of law. Code, § 268. A general exception to all the conclusions of law is not sufficient; unless it is claimed that all the conclusions are erroneous, and even in that case it is the better practice to take an exception to each and every refusal of the judge to find as requested, and to each of his conclusions upon the law excepted to. *Magie v. Baker*, 14 N. Y. (4 Kern.) 435. See *Newlin v. Lyon*, 49 N. Y. (4 Sick.) 661.

Service of the exceptions must be made within the time prescribed by the Code, section 268, or, otherwise, it will be too late. But if they are included within a case served within that time this service will be sufficient, and they need not be afterward filed or served as separate matter. *Johnson v. Whitlock*, 12 How. 574; S. C., 13 N. Y. (3 Kern.) 344. An extension of the time to make a case alone does not extend the time to make exceptions

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Questions of fact — Questions of law — Waiver of exceptions.

also. *Hatch v. Fogerty*, 7 Rob. 488 ; 40 How. 492 ; 10 Abb. N. S. 147 ; *Beach v. Gregory*, 3 Abb. 78 ; S. C., 1 Hilt. 201 ; affirming S. C., 2 Abb. 203. See *Salls v. Butler*, 27 How. 133. The time to make exceptions may, however, be extended, and in a proper case, an order will be granted to file them *nunc pro tunc*. *Sheldon v. Wood*, 14 How. 18 ; S. C., 6 Duer, 679 ; *Bortle v. Melten*, 14 Abb. 228 ; *Coe v. Coe*, id. 86 ; S. C., 37 Barb. 232. See New Trials.

c. Questions of fact. No finding of facts by the general term shall be required for the purpose of review in the court of appeals, and if the judgment be reversed at the general term, it shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal ; and in that case, the question whether the judgment should have been reversed, either upon questions of fact or of law, shall be open to review by the court of appeals. Code, § 268. The provision in this section, "that a judgment shall not be deemed to have been reversed upon questions of fact unless so stated in the order of reversal," is applicable only to cases tried by the court and a referee, and not to cases tried by jury. *Sands v. Crooke*, 46 N. Y. (1 Sick.) 564 ; *Dickson v. Broadway & Seventh Avenue R. R. Co.*, 47 N. Y. (2 Sick.) 507. See *Wright v. Hunter*, 46 N. Y. (1 Sick.) 409 ; *Tomlinson v. The Mayor of New York*, 44 N. Y. (5 Hand) 601 ; *Kirkland v. Leary*, 50 N. Y. (5 Sick.) 678.

d. Questions of law. In order to raise any question for review, where the cause is tried by the court without a jury, exceptions to conclusions of law are indispensable. *Weed v. New York & Harlem R. R. Co.*, 29 N. Y. (2 Tiff.) 616 ; *Mayor, etc., of New York v. Erben*, 38 N. Y. (11 Tiff.) 305 ; S. C., 35 How. 644 ; affirming 10 Bosw. 189 ; 24 How. 358. And no authority exists for reviewing, on appeal, a decision to which no exception has been taken ; on the contrary, it is plainly prohibited. *Brewer v. Isish*, 12 How. 481 ; Code, § 268. See *Russell v. Dufston*, 4 Lans. 399.

In a case where the judge has heard the evidence of both sides, and orders judgment for the defendant, on the ground that the plaintiff has misconceived his remedy, such judgment cannot be reviewed by the court of appeals. *Bridger v. Weeks*, 30 N. Y. (3 Tiff.) 328.

e. Waiver of exceptions. Exceptions may be waived. Thus, where, pursuant to rule 50 of the supreme court, a case is sub-

Waiver of exceptions—Entry of judgment—Mode of entering judgment—Appeal.

mitted upon printed points, and no allusion is made in such points to an exception duly taken on the trial, the exception will be regarded as waived (*Mayor, etc., of New York v. Hamilton Fire Ins. Co.*, 10 Bosw. 537; S. C. affirmed, 39 N. Y. [12 Tiff.] 45; S. C., 6 Trans. App. 244); and all exceptions not noticed in the counsel's points, and which are not mentioned in his argument, are likewise deemed to have been waived. *Cummings v. Morris*, 3 Bosw. 560; S. C. affirmed, 25 N. Y. (11 Smith) 625. See *Philbin v. Patrick*, 6 Abb. N. S. 284; *Rigney v. Savory*, id. 284, n.; *Enos v. Eigenbrodt*, 32 N. Y. (5 Tiff.) 444; *Russell v. Duffon*, 4 Lans. 399.

The defendant does not, by a cross-examination, lose the benefit of an exception duly taken, for he has a right to test the correctness of testimony after exception. *Duff v. Lyon*, 1 E. D. Smith, 536. But, if a witness has been allowed to answer a question without objection, an exception subsequently interposed, must be disregarded. *Cheesebrough v. Taylor*, 12 Abb. 227.

See, further, as to waiver of exceptions, *Worrall v. Parmalee*, 1 N. Y. (1 Comst.) 519, and *Westlake v. St. Lawrence County Mut. Ins. Co.*, 14 Barb. 206.

Section 6. Entry of judgment.

a. Final hearing. See *ante*, § 4, *l*; also, Interlocutory or Decretal Orders.

b. Mode of entering judgment. It is provided by the Code "that the clerk shall keep, among the records of the court, a book for the entry of judgments, to be called the 'judgment book.'" § 279. And it is further provided that the judgment shall be entered in the judgment book. § 280.

It should be entered at length by the clerk, and it is deemed to be so entered from the time it is left with him for that purpose, and from the time when the judgment-roll is filed, although in fact it may not be actually recorded until some time afterward. 1 Barb. Ch. Pr. 341. See *Butler v. Lee*, 33 How. 251; S. C., 3 Keyes, 70. As to the mode of entering judgment, see Judgment.

Section 7. Appeal.

a. In general. The only mode of obtaining a review of a decision of a cause, tried by a judge without a jury, and where the decision directs a final judgment, is by an appeal therefrom, under the provisions of section 348 of the Code. *Hunt v. Bloomer*, 12 How. 567; S. C., 13 N. Y. (3 Kern.) 341; *Mallory*

Appeal.

v. *Wood*, 14 How. 67; S. C., 3 Abb. 371; 6 Duer, 657; *Watson v. Scriven*, 7 How. 10; *Wright v. Delafield*, 11 id. 466. All the issues in the action must be disposed of before an appeal will lie. If there is a reference to state an account, no appeal lies until the order or decree is entered upon the reference. *Griffin v. Cranston*, 5 Bosw. 658.

But if the decision does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may have a review of the interlocutory decision by a motion for a new trial at general term, and for that purpose may, within ten days after notice of the decision being filed, except thereto, and make a case or exceptions, as provided in case of an appeal. Code, § 268. See *Bolles v. Duff*, 55 Barb. 580; 7 Abb. N. S. 385; 38 How. 504.

For the proceedings on this motion, see New Trial.

An appeal from the judgment will not be heard by the general term, but will be dismissed, unless there is incorporated in the case a finding of facts by the justice who tried the cause. This is held to be the rule unless, before the cause is submitted, the parties are willing to consent that it be sent back for correction. *Matthews v. Mayor, etc., of New York*, 14 Abb. 209.

Where a judgment, after a trial by the court, comes up for review, without any finding of facts, nothing will be presumed against the correctness of the decision, but the presumption will always be in favor of the decision rendered. *Viele v. Troy & Boston R. R. Co.*, 20 N. Y. (6 Smith) 184; *McKeon v. See*, 4 Rob. 449. See 8 Alb. Law Jour. 107; *Valentine v. Conner*, 40 N. Y. (1 Hand) 248; *Meyer v. Amidon*, 45 N. Y. (6 Hand) 169; *Tomlinson v. Mayor, etc., of New York*, 44 N. Y. (5 Hand) 651. See Appeals, *post*.

CHAPTER IV.

TRIALS OF ISSUES OF LAW.

ARTICLE I.

PREPARATION FOR TRIAL.

Section 1. Bringing on the trial.

a. At what term and place. Under the former practice, prior to the adoption of the Code, issues of law were always heard at the general term, without reference to the place where the venue was laid, and the judiciary act of 1847 left such issues to be brought to argument as formerly, without reference to the venue. See Laws of 1847, ch. 280, § 46.

The Code of 1849 required issues of law to be tried at a circuit court or special term (Laws of 1849, ch. 438, § 255); and it was held, that the trial might be brought on at any special term in the judicial district, or at a special term in a county adjoining that named in the complaint, though in another district. *Ward v. Davis*, 6 How. 274. The above section of the Code (255) was so altered in 1851, as to leave no doubt that an issue of law might be brought to argument at any general term in the district (see Laws of 1851; Code, § 255); but in the following year, it was again changed, and its original language substantially restored, as it existed at the time of the above decision, and as it exists at present, namely, that "issues of law must be tried at a circuit court or special term." Code, § 255. As the convenience of witnesses, which is the principal reason for confining the trial of an issue of fact to a particular locality, does not apply to the trial of an issue of law, it would seem that the rule as laid down in *Ward v. Davis*, 6 How. 274, is still applicable, and that an issue of law may now be tried at a special term in a county in the district other than that indicated as the place of trial in the complaint. Opposite views have, however, been entertained, as to which, see 1 Monell's Pr. 700; 2 Till. & Sher. Pr. 514.

b. Before what court. An issue of law must be tried by the court, at a special term, or at circuit, unless it be referred by consent of the parties, as provided in sections 270 and 271 of the Code. See Code, § 253.

c. Notice of argument. The manner of noticing the issue for trial or argument, placing it on the calendar, etc., is in most

Notice of argument — Form of notice of trial or argument — Form of note of issue.

respects the same as upon a trial by jury, as to which see *ante*, pp. 33 to 39. At any time after issue, either party may give notice of trial, at least fourteen days before the court, unless the service is by mail, in which case it must be given sixteen days before the "day of trial," including the day of service. Code, §§ 256, 412. By the "day of trial" in the latter section is undoubtedly meant the first day of term, and not the day at which the cause may actually be reached. See *Manchester v. Herrington*, 10 N. Y. (6 Seld.) 164.

Form of notice of trial or argument.

(Title of cause.)

Take notice, that the issue (or issues) of law in this action will be brought to trial at a special term of this court (or at a circuit court), appointed to be held in and for the county of _____, at the City Hall, in the city of _____ (or at the court-house in the town of _____), on the first Tuesday (or other first day of the term), of _____ next, at _____ o'clock in the forenoon of that day, unless the same has been previously tried.

(Date.)

(Address.)

(Signature.)

d. Copies of pleadings and points. At the opening of the argument the court must be furnished with a fair copy of the pleadings, and the court and opposite counsel should at the same time be furnished with copies of the points to be used on the argument, by the party bringing it on. See Sup. Ct., Rule 49.

e. Note of issue. The party giving the notice of trial shall furnish the clerk, at least eight days before the court, with a note of the issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served, and the clerk shall thereupon enter the cause upon the calendar according to the date of the issue. Code, § 256.

Form of note of issue.

court,
special term.

E. F., plaintiff, <i>agst.</i> G. D., defendant.	}	D. M., plaintiff's attorney <i>Issue of law.</i> E. B., defendant's attorney.
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Demurrer.

Issue joined February 21, 1873.

No. of cause on previous calendar, 156 (or, not on previous calendar.)

Plaintiff's (or defendant's) note.

In the first judicial district there need be but one notice of trial, and one note of issue from either party, and the action shall then remain on the calendar until disposed of, and, when called, may be brought to trial by the party giving the notice. Code, § 256.

ARTICLE II.

TRIAL OR ARGUMENT.

Section 1. Proceedings on.

a. Furnishing papers. The papers to be furnished, on the trial of the issue, is a copy of the pleadings, when the question arises on the pleadings, or on any part thereof; or, where the question arises upon demurrer, such part only of the pleadings as relate to the question. It is the duty of the plaintiff to furnish the papers where the issue arises upon the pleadings, and of the party demurring, when the issue arises on demurrer. Sup. Ct., Rule 49. See *ante*, 228.

Each party is required to prefix to his points a concise statement of the facts of the case, with a reference to the folios, and if such statement is not furnished, no discussion of the facts by the party omitting such statement will be permitted. Rule 49, Sup. Ct.

Although, when the question to be decided arises on demurrer, the party demurring must furnish the court with a copy of the pleadings and other papers, he is not required to serve them on the opposite party. *Gallt v. Finch*, 24 How. 193.

b. Opening argument. The argument is opened by the counsel for the party demurring, who also furnishes the court with all the requisite papers.

c. Reply. The counsel for the opposite party replies to the opening argument.

d. Closing the argument. The argument is closed by the counsel for the demurrant.

e. General practice on argument. The trial of an issue of law is merely an oral argument in court before the judge; or, as is sometimes the case, a mere submission of the cause on written points without argument. On an oral argument the court will not usually hear more than one counsel on each side, or for more than one hour each. Rule 58, Sup. Ct. Hence, the de-

The decision or judgment, how rendered — *Withdrawing demurrer.*

murrant, in opening, should not occupy more than half an hour, and thus have as much time in closing. The court, however, will allow such time as may be required for a full, fair hearing.

ARTICLE III.

THE DECISION OR JUDGMENT.

Section 1. How rendered.

a. In general. The decision may be pronounced on the argument, or, the court may take the papers for examination and render the decision at some subsequent time. In the former case, an order may be drawn up at once, and submitted to the opposite counsel, or settled by the court, and entered. In the latter case, the decision is usually indorsed on the papers retained for examination, after which they are transmitted to the attorney for the successful party. The order is then drawn up by him, entered, and a copy served in the usual manner. See 1 Van Sant. Eq. Pr. 474. The decision must state the conclusions of law found. Code, § 267.

b. Rules of decision. The decision of the judge upon the trial of an issue of fact is required to be given in writing. Code, § 267. And a judgment entered upon such a trial by the court, without such a written decision, is irregular. *Thomas v. Tanner*, 14 How. 426; *Burger v. Baker*, 4 Abb. 11. See *Sands v. Church*, 6 N. Y. (2 Seld.) 347; *Ragan v. McCoy*, 26 Mo. 166; *Sutter v. Streit*, 21 id. 157; *Bates v. Bower*, 17 id. 550; *Russell v. Armador*, 2 Cal. 305. But it is not void. *Lewis v. Jones*, 13 Abb. 427. And not only must the decision be in writing, but it must be signed by the judge. *Thomas v. Tanner*, 14 How. 426. Such, at least, is the more correct, as well as the safer practice. *Burger v. Baker*, 4 Abb. 11, 13, 14. The judgment upon a demurrer is pronounced by the court, and if rendered in open court is entered by the clerk in his minutes. If the judge reserves his decision, and takes the papers home with him, he notes his decision in writing upon the papers, and signs his name or initials at the end of the statement of the judgment rendered. When the decision is regarded as an order, see the next article.

c. Withdrawing demurrer. If a party allows a demurrer to remain upon the record, which he has had leave to withdraw, he

Pleading over — Amendment.

thereby incurs the risk of having that demurrer used by his adversary, as an admission, upon the subsequent trial. See *Cutler v. Wright*, 22 N. Y. (8 Smith) 472.

d. Pleading over. Where a demurrer has been overruled, either at a general or a special term, it is usual to allow the defeated party to plead over, where it appears that the demurrer was interposed in good faith; but upon such terms as may be just. Code, § 172. If, however, the demurrer is clearly frivolous, or untenable, leave to plead over may very properly be refused by the court. And where the pleader interposes a demurrer in the honest belief that it might be available, but without any expectation of disposing of the cause on its merits, the demurrer cannot be deemed to have been put in in good faith, and leave to withdraw it and put in an answer will not be granted. *Osgood v. Whittlesey*, 10 Abb. 134; S. C., 20 How. 72; S. C. affirmed, *id.* 76. See *Patten v. Harris*, 10 Wend. 623. It may, however, be stated as a general rule, that whenever the case presents any question on the merits, leave to plead over will be given.

On granting such leave, terms are usually imposed, such as the payment of the costs of the demurrer, which are almost universally allowed. See *Getty v. Hudson River R. R. Co.*, 8 How. 177; *Lord v. Vreeland*, 24 *id.* 316; S. C., 15 Abb. 122.

If leave to plead over is refused by the court, the opposite party is entitled to enter judgment upon the decision as of course.

e. Amendment. Upon allowing a demurrer, it is almost the invariable practice for the court to grant leave to the pleader to amend upon terms; but such amendment as is allowed by the decision must be made within the time therein prescribed, or the entry of judgment for the demurring party follows, as of course, provided there is no issue of fact to be tried. See Code, § 267.

Though leave to amend is rarely refused, the granting of it may be opposed by the opposite party, and, where the pleading is clearly of a frivolous nature, such opposition may prevail.

In case the demurrer fails, the court cannot properly, as part of the decision, grant leave to amend, to the party whose pleading is demurred to. It should be made the subject of a separate application to the court. *Lord v. Vreeland*, 13 Abb. 195; S. C. affirmed, 15 *id.* 122; S. C., 24 How. 316. It is specially provided by the Code, that if the demurrer be allowed for misjoinder of causes of action, the court may, in its discretion, and upon such

Filing decision—Issues of fact as well as of law—Proceedings after decision.

terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action mentioned therein. Code, § 172.

Upon overruling a demurrer, leave to amend the pleadings of both parties may be granted. See *Rider v. Pond*, 18 Barb. 179 ; S. C., 12 N. Y. Leg. Obs. 278.

f. Filing decision. The decision of the court is required to be filed with the clerk within twenty days after the court at which the trial took place. Code, § 267.

g. Service of copy of decision. In a case where leave to amend, or to plead over, is granted by the court, the decision of the judge should be entered as an order, and a copy served in the usual manner, upon the opposite party.

h. Issues of fact, as well as of law. In a case where there are issues both of law and of fact, and the cause is brought on for the trial of the issues of fact, it will then be determined by the court whether the issues of fact shall be tried before the issue of law is disposed of. If an issue of fact be first tried, without any actual direction of the court, but also, without any objection from the adverse party, it will be deemed to have been first tried by order of the court. *Warner v. Wigers*, 2 Sandf. 635. See, also, *Fry v. Bennett*, 9 Abb. 45 ; S. C., 3 Bosw. 200 ; S. C. affirmed, 28 N. Y. (1 Tiff.) 324. On demurring to part of an answer, the plaintiff may put the cause on the calendar for a trial of the issues of fact, without waiting for the decision upon the issues of law. *Palmer v. Smedley*, 13 Abb. 185.

i. Exceptions to decision. Upon the trial of an issue of law no exceptions are necessary or proper. See *ante*, pp. 222 to 225, as to exceptions to decision of judge on the trial of an issue of fact.

ARTICLE IV.

PROCEEDINGS AFTER DECISION.

Section 1. In general. If, by the decision of the court, leave to amend or to plead over be granted, the party in whose favor the decision is made should see that the time allowed for either purpose is properly limited, and that any terms imposed on granting such leave are clearly expressed ; for, no further step can be taken in the cause, until the expiration of the time so allowed ; or, of an extension thereof, duly obtained:

Proceedings after decision — Assessing damages, or further application to court.

By the construction given to the second subdivision of section 349 of the Code, all decisions of demurrers are treated as *orders*, when they give leave to amend, so long as the time to amend is running (see *Moza v. Sun Mutual Ins. Co.*, 22 How. 60; S. C., 13 Abb. 304); hence, the defeated party should procure an order to be entered, directing judgment against him unless he so amends or pleads; for the reason that he can then appeal from the *order*, whereas, he could otherwise appeal only from the *judgment*. See *Wightman v. Shankland*, 18 How. 79.

If such party avail himself in due time of the leave granted to amend, or plead over, a new issue is thereby formed, and the prior proceedings become obsolete, except only so far as they may have a controlling effect on those subsequent, in preventing the objectionable matter from being again brought forward. But, in case the party suffers the time allowed to elapse without taking the requisite steps, he will be precluded from making further amendments, if the demurrer be to a part of the pleading only; or, if it be to the whole pleading, the successful party will be entitled to judgment on such demurrer, precisely as if leave to amend or to plead over had not been granted by the court. *Moza v. Sun Mutual Ins. Co.*, 22 How. 60; S. C., 13 Abb. 304.

If the answer demurred to is sufficient to bar the action, and the demurrer is overruled, the proper judgment is a final one against the plaintiff, that he take nothing by his complaint, and that there be a dismissal thereof, even though there may be issues of fact joined in the cause. *Wightman v. Shankland*, 18 How. 79.

a. Judgment for costs. Where there is an issue of law and an issue of fact joined in a cause, no judgment for costs can be entered in favor of the party who prevails upon the issue of law, until the issue of fact is disposed of; and such a judgment would, if rendered, be irregular, and would be set aside on motion. *Masters v. Barnard*, 6 How. 113, 114; S. C., 1 Code R. N. S. 407. See *Palmer v. Smedley*, 13 Abb. 185.

This rule in relation to costs of demurrer does not, however, apply to the costs on appeal from an order overruling a demurrer. *Henderson v. Jackson*, 2 Sweeny, 603.

b. Assessing damages, or further application to court. It frequently occurs, in equity cases, that a further application to the court is necessary as for an order of reference to take an account, or to prove some fact necessary to enable the court to

Trial of issues of fact.

complete the judgment, or to carry it into execution, or, to ascertain the nature and extent of the relief to be adjudged; and such application will, of course, be upon notice to the opposite party. It must be made in the same manner as an application for judgment on failure to answer where the summons has been personally served. Code, § 269. See 1 Van Sant. Eq. Pr. 477.

c. Trial of issues of fact. Where there is an issue of law and also an issue of fact in the same action, the trial of the former, in almost every case, brings about a postponement of the trial of the latter. As where one of several separate causes of action in the complaint has been demurred to, and the residue answered to by the defendant, it would be clearly improper for the action to be partly tried on the issues of fact, leaving the other issues to be settled and tried at a future time; for, on the decision of a demurrer, it is usual for the court to give the party against whom the decision is made leave to amend, who then has an opportunity for framing other issues of fact in the action. Where the decision is made on the argument, such issues are frequently framed on the spot. Thus, where the plaintiff demurs to one of several answers, and the demurrer is overruled, the answer demurred to then makes an issue, unless it be a counter-claim, in which case the plaintiff, if he please, may draw and serve a reply at once, and go to trial. Or, if such demurrer be sustained, the defendant, if he please, may abandon the answer demurred to, or amend it on the spot and go to trial. See 1 Van Sant. Eq. Pr. 474.

Where there are issues of fact remaining undisposed of, in the action, final judgment against a defendant on an issue of law cannot be perfected. The decision of the court remains an order merely, from which an appeal lies to the general term, but not to the court of appeals, and the successful party must await the determination of the issues of fact before he can enter and perfect final judgment on the whole record. *Paddock v. The Springfield Fire Ins. Co.*, 12 N. Y. (2 Kern.) 591. See *Adams v. Fox*, 27 N. Y. (13 Smith) 640; *Ferris v. Aspinwall*, 10 Abb. N. S. 137.

But final judgment may be entered on an issue of law against a plaintiff, where there are still issues of fact in the same action; the rule of practice in this respect being thus stated, in *Wightman v. Shankland*, 18 How. 79: "If there is an issue of fact,

and also an issue of law, and the latter is first tried, and the decision upon it is in favor of the defendant; but the question decided does not *bar* the action, the issue of fact must be tried before the judgment-roll is made up, but if the defendant's plea in answer is sufficient to *bar* the action, and is demurred to, and the demurrer is determined in favor of the answer, the judgment, that the plaintiff take nothing by his complaint, is the proper judgment, though there may be issues of fact joined in the cause. And the reason is quite obvious. If the defendant states, in one answer, facts which constitute a *bar* to the action, and these facts are admitted by the demurrer, there can be no necessity of trying any of the issues of fact, as the defendant must have judgment upon the whole record."

There is considerable discrepancy in the several provisions of the Code as to which shall have the preference on the calendar, an issue of law or an issue of fact. Thus, by sections 251 and 255 preference is given to issues of law, unless the court otherwise direct, while section 257 provides that, unless for the convenience of parties, or the dispatch of business the court shall otherwise direct, the issues on the calendar shall be disposed of in the following order :

1. Issues of fact to be tried by a jury.
2. Issues of fact to be tried by the court.
3. Issues of law.

The whole subject being under the control and subject to the discretion of the court, but little inconvenience can result from the discrepancy. In practice, the provisions of section 251 are generally observed especially where there are issues of law and of fact.

d. Taxing costs. If judgment is rendered in favor of a party demurring, and the party whose pleading is found defective is allowed to amend on payment of costs, the costs for proceedings before notice of trial should be allowed. *Hendricks v. Bouck*, 2 Abb. 360; S. C., 4 E. D. Smith, 461; *Collomb v. Caldwell*, 5 How. 336; S. C., 1 Code R. N. S. 41. See *Keil v. Rice*, 24 How. 228; *Saratoga & Washington R. R. v. McCoy*, 7 id. 190; *Considerant v. Brisbane*, 7 Abb. 345, n; S. C., 1 Bosw. 644.

On the other hand, where the demurrer is overruled, with leave to answer over, the successful party is not entitled to claim the payment of such costs as part of the costs to be paid on answering. Such costs are only taxable once on a final recovery.

Taxing costs — Entering judgment — Appeal.

Young v. Gori, 13 Abb. 13, *n*; *Anonymous*, 3 Sandf. 756; *Phipps v. Van Cott*, 15 How. 110; *Nellis v. De Forrest*, 6 id. 413; *Roberts v. Morrison*, 7 id. 396; S. C., 11 N. Y. Leg. Obs. 16; *Crary v. Norwood*, 5 Abb. 219; *Van Valkenburg v. Van Schaick*, 8 How. 271.

As the condition of amending or pleading over, subsequent costs before trial, a trial fee for an issue of law, and term fees, in case any are incurred, are properly taxable in every case. Any necessary disbursements may also be taxed. *Ib.* See *Van Valkenburg v. Van Schaick*, 8 How. 271.

And the same costs are taxable and payable, as a condition of allowing an amendment or pleading over, on every occasion on which the case may come before the court on demurrer. *Considerant v. Brisbane*, 7 Abb. 345, note; S. C., 1 Bosw. 644. So, where two or more defendants demur separately, and the demurrers are allowed, with leave to the plaintiff to amend, each defendant is entitled to costs. *Collomb v. Caldwell*, 5 How. 336; S. C., 1 Code R. N. S. 41. And where two defendants put in separate answers, to which the plaintiff demurred, and the demurrers were allowed with leave to the defendants to amend on payment of costs, it was held, that the plaintiff was entitled to a separate bill of costs against each defendant. *Comstock v. Halleck*, 4 Sandf. 671. But this decision has been questioned. See *Buell v. Gay*, 13 How. 31; see, also, *Phipps v. Van Cott*, 15 id. 110.

Costs awarded on a demurrer to part of a pleading are held to be final, and not interlocutory in their nature, and they cannot, therefore, be recovered until judgment is rendered upon all the issues. *Mora v. The Sun Mutual Ins. Co.*, 22 How. 60; S. C., 13 Abb. 304; *Palmer v. Smedley*, 13 id. 185.

e. Entering judgment. Judgment upon the decision of the court must be entered within four days after such decision is filed with the clerk. Code, § 287.

f. Appeal. An appeal is given by the Code from the special to a general term of the supreme court, from an order sustaining or overruling a demurrer. Code, § 340, subd. 2. But the decision of the supreme court upon the demurrer cannot be reviewed except by an appeal from the judgment, and upon such appeal any intermediate order involving the merits, and necessarily affecting the judgment, may be reviewed. Code, § 11, subd. 1. Until the entry of final judgment upon the demurrer, it is not in a condition to be reviewed in the court of appeals. *Adams v.*

Form of order sustaining demurrer — Order overruling demurrer.

Fox, 27 N. Y. (13 Smith) 640 ; *Paddock v. The Springfield Fire and Marine Ins. Co.*, 12 N. Y. (2 Kern.) 591 ; *Ferris v. Aspinwall*, 10 Abb. N. S. 137 ; *Weaver v. Barden*, 49 N. Y. (4 Sick.) 286, 297. See Subject of Appeals.

*Form of order sustaining demurrer.**(Title of cause.)**(At a special term, etc.)*

This action having been brought to trial on the issues of law joined therein, and after hearing E. B., in support of the demurrer, and D. M. (*or, no one appearing*), in opposition :

ORDERED : That said demurrer be sustained, and that defendant (*or plaintiff*) have judgment thereon ; but with leave to the plaintiff (*or defendant*) to amend the complaint (*or answer, or reply*), within twenty days, on payment of costs.

*Order overruling demurrer.**(Title of cause.)**(At a special term, etc.)*

This action having been brought to trial on the issues of law joined therein, and after hearing D. B. in support of the demurrer, and J. K. (*or, no one appearing*) in opposition :

ORDERED : That said demurrer * be overruled, and that plaintiff (*or defendant*) have judgment thereon ; but with leave to the defendant (*or plaintiff*) to withdraw his demurrer (*and put in an answer or a reply*) within twenty days, on payment of costs.

Order sustaining demurrer in part, and overruling it in part.

(*Same as last form to the *, and continue :*) to the first cause of action set forth in the complaint be sustained ; and that the defendant have judgment thereon ; and that the demurrer to the second cause of action be overruled ; and that the plaintiff have judgment thereon, but with leave to the plaintiff to serve an amended complaint within days, and to the defendant to withdraw his demurrer to the second cause of action, and to answer the same.

CHAPTER V.

REFERENCE, AND APPOINTING A REFEREE.

ARTICLE I.

PROCEEDINGS TO APPOINT A REFEREE.

Section 1. Nature, object and origin of the appointment.

a. In general. The words "arbitrator" and "referee" are sometimes used synonymously. The principal difference in practice is, that there may be an arbitration without an action, while a reference is a proceeding in a pending action, although in the latter case the referee is sometimes called an arbitrator.

An arbitration, in its technical sense, relates to the submission of matters in difference to individuals selected by the parties, to hear and decide the points in dispute, who, while they act in the capacity of judge, as well as jury, do not, in any proper sense, proceed in such a manner that their proceedings constitute an action at law or a suit in equity ; and their acts are not reviewed as proceedings in an action.

A reference, in its usual sense, is a proceeding in an action, and the referee takes the place of both judge and jury, and his acts may be reviewed like any other proceeding in the course of the action.

Another difference is, that an arbitration is a voluntary matter so far as the submission is concerned, while in many cases a reference may be compelled in an action pending in court. It is not intended to discuss here any proceedings, except such as may be regarded as references of matters or questions arising in the course of an action at law or a suit in equity, or in some way connected with, or relating to, such actions or proceedings.

In actions at law, a reference, properly made, is a substitute for a trial by jury ; and the report of the referee is regarded in the same light as the verdict of a jury. *Alexander v. Fink*, 12 Johns. 219 ; *Beebe v. Bull*, 12 Wend. 507 ; *Crouch v. Gridley*, 6 Hill, 250. In equitable actions, references are frequently convenient or necessary as a means of furnishing the court with information ; and the referee then performs the duty of a former

master in chancery; and this is also the rule where a reference is ordered in cases in which a question of fact arises, otherwise than upon the pleadings, during the progress of the action, whether upon motion or otherwise.

In actions at law, where all the issues are referred, the referee acts both as court and jury. In equitable suits, upon a reference of all the issues, the referee acts in the place of the court, which tries issues of fact without the aid of a jury.

In all other references of some special matter, or for the purpose of acquiring information to aid the court in deciding a cause, or for carrying a decree or judgment, or other proceeding, into effect, the referee acts as an officer of the court, and in its place for the purpose specified in the order of reference.

As the reference of the issues in the action to a referee for trial, is a legislative substitute for a jury trial, the statutory authority is to be pursued, or the proceeding will be a mere arbitration instead of a reference. *Blunt v. Whitney*, 3 Sandf. 4; *Dodge v. Waterbury*, 8 Cow. 136; *Rathbone v. Lounsbury*, 2 Wend. 595; *Jones v. Cuyler*, 16 Barb. 576.

The court, however, will indulge all reasonable intendments or constructions in favor of sustaining the proceeding as a reference. *Merritt v. Thompson*, 27 N. Y. (13 Smith) 225; *Healy v. Gilman*, 6 Rob. 479, 495.

In some cases the parties have no choice as to the mode of trial, as the court has the power to order a reference even against the wishes of the litigants. But, in a much larger proportion of cases the parties have a right to try the cause before the court and a jury, or by the court alone, in equitable actions, while they may consent to a reference of any or all the issues in the action, whether it be a legal or an equitable one. Under a system which permits such a general reference of every action and of all questions therein, whether of law or of fact, there are some considerations deserving the attention of parties and of practitioners. Some of the advantages of a reference are, that the hearing is not limited to some particular time and place, like a trial at the circuit, and, therefore, the court may be considered as open at all times; the place of trial may be fixed with reference to the convenience of parties and witnesses, thus saving time and expense; the parties may choose a referee mutually satisfactory, which is not always the result of selecting a jury as they are ordinarily drawn and impaneled; the labors of counsel are

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Proceedings to appoint a referee — Reference prior to the Code.

greatly reduced when but a single cause is on trial, instead of having the charge of several important causes to be disposed of in the hurry and press of business at circuit, thus securing a full and careful trial of the issues ; the selection of a referee who is skilled in some particular subject is sometimes important, and it may be secured in this mode of trial ; the evidence is taken in writing by the referee, so that it may all be recollected and duly examined and considered ; the summing up of the cause may be carefully done by means of a full, previous preparation, and ample time for presenting arguments, which cannot always be done at circuit trials ; the referee may take notes of all arguments, and of all authorities cited, and may thus take time to give both a full examination before deciding the cause ; and the report may be so framed as to provide for every interest of every party to the action. A reference avoids the delays and expenses of attending several circuits before a cause can be regularly reached and heard ; it avoids the inconveniences and risks of the absence of a material witness who may be most important and yet absent when the cause is called, thus losing his evidence or postponing the cause at great expense ; it enables a party to supply unexpected defects in proof, or to meet evidence which operates as a surprise ; it enables a party to secure the attendance of such counsel as the party prefers, by trying the cause at such a time as they can attend ; it is a safe mode for a party having a good cause of action, or a valid defense, for this mode of trial will secure a full hearing of evidence or of arguments ; the referee possesses all the general powers which will enable him to dispose of the case as carefully and sufficiently as a trial before the court, and upon the whole finding and report there may be a full review of all his decisions during the progress of the action before him.

Some of the inconveniences of a reference are, that there are great delays which result from numerous postponements, when the number of them, or the intervening time between them might be less ; that the expenses are sometimes large, owing to the amount of fees paid to the referee, and for the unnecessary hearings, at many of which little is done except to adjourn the hearing, and the advantage of a free discussion by a full, fair and intelligent jury is not secured.

b. Reference prior to the Code. Under the former practice, when actions at law and suits in equity were separate proceed-

Reference prior to the Code.

ings, in different courts, there was a right to a reference in actions at law in some cases. But the powers of the court in ordinary or compulsory references were not so extensive as those now authorized, and a reference of all the issues by the consent of the parties was not provided for in the statute.

Under the Revised Statutes there might have been a reference in an action at law, which was at issue in a court of record, if the cause of action was founded upon contract; or, in case of a default entered for want of a plea, where it appeared that the trial, or the assessment of damages therein, would require the examination of a long account on either side. 2 R. S. 384 (398), § 39. In such cases the court might order the reference on the application of either party, or, after issue joined, without such application; or, on the application of the plaintiff, after a default entered for want of a plea. *Ib.*

Again, where a cause was noticed for trial at a circuit, and it appeared that the trial would require the examination of a long account on either side, the circuit judge might order a reference of the cause. 2 R. S. 384 (399), § 41; Laws of 1845, ch. 163; Laws of 1836, ch. 499. The supreme court had power, however, to review the order and to revoke it, if deemed proper to do so. *Van Rensselaer v. Jewett*, 6 Hill, 373; *Thomas v. Reab*, 6 Wend. 503; *Levy v. Brooklyn Fire Ins. Co.*, 25 id. 687.

This statute does not violate either the National or the State constitutions as to the right of trial by a jury, in the cases in which such a trial had been heretofore used, for such references had been in use long before the adoption of the State constitution under consideration. *Lee v. Tillotson*, 24 Wend. 337. If a plea which required a replication was put in, there must have been an issue joined before a reference could be ordered. *Yale v. Codrington*, 21 Wend. 175.

Under this statute there could not be a reference in actions for torts. *Silmser v. Redfield*, 19 Wend. 21; *Dederick's Adm'rs v. Richley*, id. 108; 2 Hill, 271; *Beardsley v. Dygert*, 3 Denio, 380. And, although there might have been many items of damage involved, no reference was permitted, unless the trial required the examination of a long account, in the ordinary acceptance of the term. *Ib.*; *Van Rensselaer v. Jewett*, 6 Hill, 373; *Thomas v. Reab*, 6 Wend. 503.

No reference was ordered where difficult questions of law would arise on the trial, nor in cases in which there were but few

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Reference under the Code.

items of account involved. A compulsory reference could not be ordered, except in the cases mentioned, and a reference by consent, in cases not provided by statute, was equivalent to an arbitration.

Section 2. Reference under the Code.

a. In general. The Code has greatly extended the power of the courts, and the rights of the parties as to the reference of causes; and, under the present practice, there is no limit to the right of the parties in securing a reference, if they choose to do so. The right to a reference does not at all depend upon the nature of the action, nor whether it be legal or equitable; or for a tort or upon contract, or whether the issues are of fact or of law; for, in every case, the issues may all or any of them be referred upon the written consent of the parties. Code, § 270. The effect of this change will be very advantageous in many instances, which will be noticed in the subsequent pages of this work. It will be noticed that the statute provides for the reference of all or any of the *issues* in the action, and, therefore, the right to a reference by consent will depend upon the existence of issues of fact or of law. The provision does not extend to all pending actions in which no issues have been joined, and, therefore, if no answer to the complaint is served, or, if no reply is served where one is required by law, or, if no demurrer is interposed so as to raise an issue, there can be no reference under section 270, and the case must be disposed of in some other manner.

But, if issues are joined, there must be a consent of the parties to authorize the court to order a reference in most instances in which issues are joined, because most of the actions are of such a nature that a compulsory reference cannot be ordered.

There are some cases, however, in which the courts have the power to compel a reference, because such a course is best for the public interests. The examination of long accounts on a trial at the circuit would be most detrimental to the interests of other litigant parties, and would needlessly waste the time of the court, of jurors, and of the public in general. So, where the taking of an account is necessary for the information of the court, or, where a question of fact arises otherwise than upon the pleadings in any stage of the action, the power to dispose of these matters by the aid of a reference is a most useful one, and it is granted by statute. Code, § 271. The court may exercise

this authority upon the application of either party, or upon its own motion, unless the investigation of such cases will require the decision of difficult questions of law. *Ib. Ante*, 9 to 12.

It is evident that such a compulsory power is essential in many cases; for, while there may be a reference in all cases, upon the written consent of the parties, it may happen that one or both of them will refuse to give such consent; and, in that case, the cause must be tried by the court or by a jury, greatly to the detriment of the interests of the public at large.

In the course of an action there are numerous instances in which references, other than for the trial of the issues joined, are necessary, and the court possesses full authority for the purpose of ordering the reference. See Interlocutory Decrees, Orders, etc.

b. In what actions. In few things have greater changes been made by the Code than those in relation to the reference of causes. The extent of the change is not fully appreciated without a contrast of the former powers of the court in that respect with those now exercised. Under the old law there were but few classes of cases in which a reference could be ordered, either by the court on its own motion, or upon the consent of the parties; and those cases were in actions at law. The instances in which courts of equity referred matters to the masters will not be noticed at this time.

At the present time the supreme court has general jurisdiction over all actions, whether legal or equitable. Formerly, in actions at law relating to real or personal property, or to personal rights, including all the forms of action founded upon contracts, express or implied, or upon torts of some kind, the number of cases in which an action might be brought, was very great. And the same was true of actions in equity, in which there was such a variety and number of cases which fell exclusively within equitable jurisdictions. These actions may now all be brought in the supreme court, and, by the written consent of the parties, all or any of the issues joined in any action, legal or equitable, may be referred for trial by a referee. The practical result is, to transfer to a referee all the former power of a court, or a court and jury, or of the chancellor, or a vice-chancellor, in the administration of civil justice, or of the powers of the court now possessed in the trial of issues. The most important rights or interests may thus be submitted for examination and deter-

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mination by a tribunal selected by the parties themselves, and yet possessing all the advantages of a trial by the ordinary courts, in the usual mode.

c. Consent to reference. Although the Code confers so great powers as to the reference of actions, it still imposes the condition that a reference must, in many cases, be founded upon the consent of the parties to the action. Upon general principles of law, this consent, to be valid, must be given by those who are legally competent for that purpose; and, therefore, it can only be given by those parties who are capable of appearing in the action without a guardian, next friend, committee, or some other representative of that kind. By the terms of the statute, an infant defendant is not competent to consent in such a case. Code, § 273. And, since the statute does not confer any additional powers upon persons not legally capable of giving their consent, the proper construction of the statute is that such consent can only be given by such parties as are competent to do valid acts in their own proper person and right. An infant plaintiff may appear in an action by guardian, and, in that case, the guardian, as one of the parties, may give a valid consent to a reference. And the same rule may be applicable to every case in which there was an appearance by guardian, committee, or other representative. When the parties consent to a reference, the appointment of a referee, or of referees, is not a matter of favor, or of discretion of the court, but one of strict right; for, upon the execution of a proper written consent, the statute is imperative, and declares that a reference shall be ordered to the referee named, and to no other person. Code, § 273.

A strict compliance with the language of the statute would require a written consent. Code, § 270. As no particular form is prescribed, any consent which clearly describes the action and the issues to be referred, and which names the referee proposed, will be sufficient.

The term, "written consent of the parties," implies that such consent should be signed or subscribed by the parties. And a consent, written out at length, but not subscribed by them, could not be enforced by either party against the other, if the objection of a want of signature should be made in opposition to a reference, and before it was made or entered by the clerk. Either party may insist upon a written subscribed consent, for nothing else will constitute a valid agreement within the meaning

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of the statute. An oral agreement may be withdrawn before an actual reference is ordered by the court, even though such agreement referred to a written consent which was proper in form, but was not subscribed. Such a subscription, however, may be waived, even by an oral agreement, if it is so far carried into effect as to be entered by the clerk in pursuance of an order duly made in open court. A written, unsigned consent, which is agreed to by the parties, and which is submitted to the court, will be conclusive if the court acts upon it and orders a reference in pursuance of its terms. *Waterman v. Waterman*, 37 How. 36; *People v. McGinnis*, 1 Park. 387; *Leaycroft v. Fowler*, 7 How. 259. See *Embury v. Connor*, 3 N. Y. (3 Comst.) 511.

The parties may waive a written consent altogether, and act upon an oral agreement, which will be conclusive; and, therefore, if the counsel for the respective parties agree in open court that a cause shall be referred to a referee, who is named, and the court acts upon this agreement and orders the reference, which is duly entered by the clerk, the reference will be conclusive upon the parties. *Keator v. Ulster & Delaware Plank Road Co.*, 7 How. 41; *Leaycroft v. Fowler*, id. 259; *Andrews v. Elliott*, 5 Ell. & Bla. 502; 32 Eng. Law & Eq. 311. A consent, whether written and unsigned or merely oral, when once duly acted upon in open court, and carried out by being written in the minutes of the clerk, in pursuance of an order of the court, ought to be considered a compliance with the statute, and enforced as a written consent. The object of a written consent is to prevent disputes as to the terms of the agreement, and to furnish evidence upon which the court may act; and when the parties appear in open court and agree upon a reference, there is the same propriety in enforcing the agreement that there is in compelling the performance of other stipulations of a similar character, which are daily enforced.

But, there are other grounds upon which a written consent may be waived, for, it is a very general and well-settled rule that an omission or an irregularity in the practice may be waived by the opposite party, if he voluntarily takes any subsequent steps in the action which recognize the validity or regularity of the previous proceedings; and, therefore, if a party proceeds upon a reference, he will waive all objection to the order of reference on the ground that it was irregularly entered. *Garcie v. Sheldon*, 3 Barb. 232; *Quinn v. Lloyd*, 7 Rob. 157; *Keator v. Ulster &*

Delaware Plank Road Co., 7 How. 41; *Leaycroft v. Fowler*, id. 259; *Ludington v. Taft*, 10 Barb. 447.

Where the parties agree in writing to refer a cause to a particular referee, neither of them has a right, without the consent of the other, to substitute the name of an other person as referee; and if, in obtaining the order of reference, such substitution is made, the opposite party may repudiate such act, and, on his objection, the reference will be held to be void. *Haner v. Bliss*, 7 How. 246.

But, if the party does not object, and he appears before the referee and proceeds with the cause as though the reference had been regularly made, such acts will be a waiver of the objection. *Quinn v. Lloyd*, 7 Rob. 157.

Proceedings upon a reference, while they waive every objection as to the regularity of the order of reference, do not waive the objection that the court had no jurisdiction to make the order. *Garcie v. Sheldon*, 3 Barb. 232.

The appointment of a referee ought to be entered upon the records of the court, at least in the minutes of the clerk, for a mere memorandum of the presiding judge upon his calendar is not sufficient for that purpose. *Bonner v. McPhail*, 31 Barb. 106.

A proper entry of the order, at a subsequent date, by the consent of the parties, will not render the reference so far valid as to sustain a prosecution for perjury against a witness who testified before such referee at a time anterior to the proper entry of the order of reference. *Ib.* It may be that the consent of the parties, and the act of the court founded thereon, would render the proceeding valid, or at least conclusive as between the parties to the action. *Ib.* As to supplying defects *nunc pro tunc*, see *Bucklin v. Chapin*, 35 How. 155; 53 Barb. 488; *Scudder v. Snow*, 29 How. 95.

The consent to refer need not be given by the parties in person. It may be done by the attorney on record. *Smith v. Troup*, 7 C. B. 757; 6 D. & L. 679; *Faviell v. Eastern Counties Railway Co.*, 2 Exch. 344; 6 D. & L. 54; *Wilson v. Young*, 9 Penn. St. (9 Barr) 101; *Wade v. Powell*, 31 Ga. 1; *Stokely v. Robinson*, 34 Penn. St. (10 Casey) 315.

d. Compulsory reference. As has been previously stated, there is a large class of cases in which a reference may be ordered without the consent of parties. The Code provides that where

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the parties do not consent, the court may, upon the application of either party, or of its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference in the following cases :

1. Where the trial of an issue of fact shall require the examination of a long account on either side ; in which case, the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein ; or,

2. Where the taking of an account shall be necessary for the information of the court, before judgment, or for carrying a judgment or order into effect ; or,

3. Where a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action. Code, § 271.

So, also, on an application to the court for judgment on the failure of the defendant to answer, the court may, in its discretion, order a reference to take an account, or hear proof, if the taking of an account, or the proof of any fact is necessary to enable the court to give judgment ; and where the action is for the recovery of money only, or of specific real or personal property, with damages for the withholding thereof, the court may order the damages to be assessed by a jury, or if the examination of a long account be involved, by a reference. Code, § 246.

So, upon a judgment for the defendant upon an issue of law, a reference may be ordered, if the taking of an account, or the proof of any fact be necessary to enable the court to complete the judgment. Code, § 269.

The court has power, also, to direct that the damages sustained by a party, against whom an injunction has been improperly issued, shall be ascertained by a reference. Code, § 222. Vol. 2, p. 94.

The Code also provides for the appointment of a referee to take the affidavit or deposition of any person who shall refuse to make the same, when such affidavit shall be necessary for the purpose of sustaining or opposing a motion to be made in a court of record. Code, § 401. See Motions, Orders, etc.

From the provisions of the Code above noticed, it will be seen that a compulsory reference may be ordered for purposes unconnected with, or merely incidental to, the trial of issues raised by the pleadings. The mode of appointment, and the powers and

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duties of referees appointed for such purposes will be found fully discussed elsewhere ; and in this chapter will be discussed such questions only as relate to the trial of the issues raised by the pleadings in an action.

The power to order a compulsory reference to try an issue of fact is expressly given by section 271 of the Code. The language of the section is general and authorizes the reference of any action, the trial of which shall involve the examination of a long account on either side. This provision is subject, however, to the limitation imposed by section 2 of article 1 of the constitution of this State, which declares "that the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever." *Townsend v. Hendricks*, 40 How. 143. The constitutions of 1822 and 1777 contained the same provision, and as the right to a trial by jury as it existed in 1777 has been continued and preserved to this day, no statute subsequently passed can impair it. *Ib.* This construction of section 271 of the Code renders it necessary to inquire in what cases a trial by jury had been a matter of right prior to the adoption of the present constitution.

It may be stated, generally, that all common-law actions have been triable by jury in this State as far back as its jurisprudence extends, subject only to the exception of actions on contracts, involving the examination of long accounts, which actions have always been referable ; and as the right to a jury trial where it formerly existed is not impaired by the Code, it follows as a rule, without exception, that the power of the court to order a compulsory reference is confined to actions on contracts in which the trial of an issue of fact will require the examination of a long account. *Townsend v. Hendricks*, 40 How. 143 ; *Kain v. Delano*, 11 Abb. N. S. 29. And not only must the action arise on contract and involve the examination of a long account, but the accounts must be directly, and not collaterally or incidentally involved, and must be the immediate object of the suit, or the ground of the defense. *Kain v. Delano*, 11 Abb. N. S. 29 ; *Cameron v. Freeman*, 18 How. 310 ; S. C., 10 Abb. 333 ; *Todd v. Hobson*, 3 Johns. Cas. 517.

If the right of either party to recover, either upon the cause of action alleged in the complaint, or upon a counter-claim set up in the answer, depends upon the result of a long account, and the action is in its nature referable, it is clear that a com-

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pulsory reference may be ordered, either of the whole or of a part of the issues. *Mills v Thursby*, 11 How. 113; *Jackson v. De Forest*, 14 id. 81; *Ross v. Mayor of New York*, 2 Abb. N. S. 266; *Atocha v. Garcia*, 15 Abb. 303; *Smith v. Dodd*, 3 E. D. Smith, 348.

And it has been held, that where an action embraces several issues, and the trial of some one of them will involve the examination of a long account, a compulsory reference may be ordered even though the determination of some other issue may render it unnecessary to try the first-named issue at all; and that whether in cases of that description the whole of the issues should be referred, or the taking of an account merely, and whether the account shall be taken before the trial of the other issues, or after, are matters in the discretion of the court, to be governed by the particular circumstances of each case. *Whitaker v. Desfosse*, 7 Bosw. 678; *Batchelor v. Albany City Ins. Co.*, 6 Abb. N. S. 240; S. C., 37 How. 399; 1 Sweeny, 346.

But the Code does not give an absolute right to have all issues referred, merely because a long account is involved. A compulsory reference in any case is not a matter of right, as the language of section 271 of the Code is, that the court may, not that it shall, order a reference in the cases specified. *Wheeler v. Falconer*, 7 Rob. 45; *Godfrey v. Williamsburgh City Fire Ins. Co.*, 12 Abb. N. S. 250; *Goodyear v. Brooks*, 4 Rob. 682; S. C., 2 Abb. N. S. 296. And as a referee has no power to adjust equities between parties, or to order any thing but the payment of money, and yet his decision is to be the judgment of the court, it is evident that it would be unjust and impolitic, in many cases, that the mere necessity of taking an account should drag with it, for trial before a referee, all other matters in the action which may infinitely more require the vigilance, discretion and experience of the court, than merely taking an account. The Code, by expressly permitting, even where a long account is involved, the referee to be confined to passing upon a specific question of fact involved in the issue, and by allowing an account to be taken, as a separate matter for the information of the court, not only authorized, but required that neither party should be deprived of the benefit of a trial before a court or a jury as to matters not involved in the account. *Wheeler v. Falconer*, 7 Rob. 45. And where the court has power to order a compulsory reference, that power should not be exercised, if the cause can be tried by the

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court in a reasonable time, as the additional delay and expense necessarily attending a trial by referee would, in many cases, amount almost to a denial of justice. *Godfrey v. Williamsburgh City Fire Ins. Co.*, 12 Abb. N. S. 250; *Goodyear v. Brooks*, 4 Rob. 682; S. C., 2 Abb. N. S. 296.

It must be remembered, also, that where the action is, from its nature, not a referable one, the answer cannot make it so, although it sets up a counter-claim necessarily involving the examination of a long account. *Townsend v. Hendricks*, 40 How. 143.

It is not possible to fix any inflexible rule by which to test what is and what is not such an account as will justify the ordering of a compulsory reference. The question is to be determined only by the particular facts of each case. *Batchelor v. Albany City Ins. Co.*, 1 Sweeny, 346; S. C., 37 How. 399; 6 Abb. N. S. 240. An account is, properly speaking, a statement of the pecuniary transactions between two or more parties, consisting of a series of charges made at various times, as the various transactions occurred. See *Freeman v. Atlantic Mutual Ins. Co.*, 13 Abb. 124. A single bill of goods containing fifty different items, delivered at one time, is in fact but one item, and is not a long account upon which a reference can be ordered. *Swift v. Wells*, 2 How. 79; *Harris v. Mead*, 16 Abb. 257. So a bill of lading, composed of any number of different articles, is considered but one item, and not a long account. *Miller v. Hooker*, 2 How. 171. A bill of particulars is not an account in the ordinary or legal sense of the term, if it includes but five distinct charges on the debit side, and one item on the credit side (*Dickinson v. Mitchell*, 19 Abb. 286); while on the other hand, a bill of particulars containing but three items, in the form of gross charges for work and labor performed, and services rendered in a long patent suit, has been held to be such an account as to justify a compulsory reference. *Thompson v. Seimer*, 40 How. 246.

For a review of all the authorities upon the question of what constitutes a long account within the meaning of the Code, see *Batchelor v. Albany City Ins. Co.*, 1 Sweeny, 346; S. C., 37 How. 399; 6 Abb. N. S. 240.

e. When the court has no power to compel. The Code, in defining the cases in which a compulsory reference may be ordered, expressly excepts all those cases where the investigation will require the decision of difficult questions of law. Code, § 271. As has been stated, the court will not order a compulsory refer-

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ence of all the issues in an action, merely because the trial of some one issue of fact will require the examination of a long account, if there are other issues in the action which may more imperatively require the vigilance, discretion and experience of the court than the mere taking of an account. *Wheeler v. Falconer*, 7 Rob. 45; *Ives v. Vandewater*, 1 How. 168; *Adams v. Bayles*, 2 Johns. 374; *Low v. Hallett*, 3 Caines, 82; *Codwise v. Hacker*, 2 id. 251; *Shaw v. Ayrs*, 4 Cow. 52. In all such cases, however, the taking of the account may be made the subject of a compulsory reference where the court deems this procedure necessary for its information before judgment, leaving the other matters involved to be disposed of at the circuit. Code, § 271, subd. 2. See Interlocutory Decrees, Orders, etc.

It is also a well-settled rule of practice, that a compulsory reference cannot be ordered in any action not arising on contract, and which does not involve the examination of a long account. The right to a trial by jury is guaranteed to the parties to the action in all other cases by the constitution of this State. *Townsend v. Hendricks*, 40 How. 143; *Kain v. Delano*, 11 Abb. N. S. 29; *Godfrey v. Williamsburgh City Fire Ins. Co.*, 12 id. 250; *Ross v. Mayor, etc., of New York*, 32 How. 164; S. C., 2 Abb. N. S. 266. And, to warrant a compulsory reference even in actions on contract, where the examination of a long account is involved, it must appear that such accounts are directly involved, and are the immediate object of the suit or the ground of the defense. The court has no power to order a compulsory reference of the whole issue where the accounts will arise and come in question collaterally or incidentally. *Kain v. Delano*, 11 Abb. N. S. 29; *Cameron v. Freeman*, 18 How. 310; S. C., 10 Abb. 333; *Todd v. Hobson*, 3 Johns. Cas. 517; *Keeler v. Poughkeepsie & Salt Point Plank Road Co.*, 10 How. 11; *Sheldon v. Weeks*, 7 N. Y. Leg. Obs. 57; *Graham v. Golding*, 7 How. 260. And not only must the examination of an account be directly involved in order to justify a compulsory reference of the whole issues arising in an action on contract, but the matter to be examined must be a *bona fide* account, and literally and truly a long account. The court has no power to order a compulsory reference in any other case. *McCullough v. Brodie*, 13 How. 346; S. C., 6 Duer, 659; *Sharp v. Mayor, etc., of New York*, 18 How. 213; *Parker v. Snell*, 10 Wend. 578; *Van Rensselaer v. Jewett*, 6 Hill, 373. See *Freeman v. Atlantic Mutual*

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Ins. Co., 13 Abb. 124; *Swift v. Wells*, 2 How. 79; *Harris v. Mead*, 16 Abb. 257; *Miller v. Hooker*, 2 How. 171; *Dickinson v. Mitchell*, 19 Abb. 286; *Batchelor v. Albany City Ins. Co.*, 1 Sweeny, 346; S. C., 37 How. 399; 6 Abb. N. S. 240; *Stewart v. Elwele*, 3 Code R. 139; *Whitaker v. Desfosse*, 7 Bosw. 678.

It should also be remembered that in many cases a reference will not be ordered without the consent of the parties, although the court may have a clear right to make the order. See *Godfrey v. Williamsburgh City Fire Ins. Co.*, 12 Abb. N. S. 250; *Wheeler v. Falconer*, 7 Rob. 45; *Goodyear v. Brooks*, 4 id. 682; S. C., 2 Abb. N. S. 296.

f. Torts. It is a well-settled rule, that an action founded on tort, or sounding in tort, is not referable against the will of either party. *Townsend v. Hendricks*, 40 How. 143; *Godfrey v. Williamsburgh City Fire Ins. Co.*, id.; *Freeman v. Atlantic Mut. Ins. Co.*, 13 Abb. 124; *Dewey v. Field*, 13 How. 437; *Ross v. Mayor, etc., of New York*, 32 id. 164; S. C., 2 Abb. N. S. 266; *Cameron v. Freeman*, 10 Abb. 333; S. C., 18 How. 310; *Dederick's Administrators v. Richley*, 19 Wend. 108; *Silmsen v. Redfield*, id. 21. And where an action from its nature is not referable, as where it is based on fraud, it cannot be made referable by setting up in the answer a counter-claim, consisting of a long account. *Townsend v. Hendricks*, 40 How. 143.

An action founded on tort may, however, be referred upon the written consent of the parties in the same manner as an action founded on contract. Code, § 270.

g. Divorce. An action for a divorce on the ground of adultery may be referred upon the written consent of the parties. *People v. McGinnis*, 1 Park. Cr. 387; *Waterman v. Waterman*, 37 How. 36; Code, § 270. A compulsory reference, however, cannot be ordered where an issue upon the question of adultery has been raised by the pleadings. *Diddell v. Diddell*, 3 Abb. 167. The Code provides that an issue of fact, in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultery, must be tried by a jury, unless a jury trial be waived as provided in section 266, or a reference be ordered as provided in sections 270, 271. Code, § 253. This section does not, however, authorize a compulsory reference to try and determine the issues where adultery is set up in the complaint and denied in the answer.

Interlocutory references.

Where an action is brought to obtain a divorce or separation, or to declare a marriage contract void, if the defendant fail to answer the complaint, or if the facts charged in the complaint are not denied in the answer, the court to which application is made for judgment shall order a reference to take proof of all the material facts charged in the complaint. Rule 87, Sup. Ct. This form of reference is proper only where there is a default in answering. Where the defendant has appeared and answered, and has set up a denial of all the material facts in the complaint, the order of reference should be to hear and determine and not to take the proofs and report them to the court. *Lincoln v. Lincoln*, 6 Rob. 525.

h. Interlocutory references. It frequently occurs upon the trial of a cause that questions of fact arise, other than such as are raised by pleadings which must be settled before complete justice can be done between the parties. To provide for such and similar cases the Code authorizes a compulsory reference whenever the taking of an account shall be necessary for the information of the court before judgment, or for carrying a judgment or order into effect; or whenever a question of fact other than upon the pleadings shall arise, upon motion or otherwise, in any stage of the action. Code, § 271.

References of this nature are frequently ordered for the purpose of assessing damages on an application to the court for judgment on failure to answer. Code, § 246. So upon judgment for the defendant, upon an issue of law, if the taking of an account, or the proof of any fact is necessary to enable the court to complete the judgment, a reference may be ordered in the same manner as upon judgment for failure to answer. Code, § 269. So the damages sustained by the defendant, or party restrained by an injunction, improperly granted, may be ascertained by a reference or otherwise, as the court shall direct. Code, § 222. References, too, are frequently ordered to settle the issues to be tried by a jury, in cases where the trial of issues of fact are not provided for by section 253 of the Code, and where either party has demanded a jury trial. See Rule 40, Sup. Ct. See *ante*, 19 to 24.

So upon the application of an infant, for the sale of his real estate, a reference may be ordered to ascertain the truth of the facts stated in the petition, and whether a sale of the premises, or any and what part thereof, would be beneficial to the infant,

and the particular reasons therefor, and to ascertain the value of the property proposed to be sold, and of each separate lot or parcel thereof, and the terms and conditions upon which it should be sold; and whether the infant is in absolute need of any and what part of the proceeds of the sale for his support and maintenance, over and above the income thereof, and his other property, together with what he might earn by his own exertions; and if there is any person, entitled to dower in the premises, who is willing to join in the sale; also, to ascertain the value of her life estate in the premises, on the principle of life annuities. Rule 68, Sup. Ct.

References may be ordered also to make inquiries as to title, liens, etc., in actions for specific performance, partition, etc. In actions for partition, the object of the reference is, not only to inquire into the situation of the property to ascertain if it can be actually partitioned, but also to ascertain and report as to the claims of creditors not parties to the action, in the form of specific or general liens upon the premises. These and other forms of interlocutory reference will be fully discussed elsewhere. See Interlocutory Decrees, Orders, etc.

Section 3. Proceedings to obtain reference by consent.

a. Form of consent. Under the provisions of section 270 of the Code, all or any of the issues in an action may be referred, upon the written consent of the parties. Under the old practice the reference of the issues, in an action not referable, or to a greater or less number of referees than the statute prescribed, was a discontinuance of the action, and the reference became an arbitration merely.

It will be seen that a consent in writing is necessary to refer issues in all cases in which the court may not compel a reference, and hence a written consent is just as necessary to a valid reference under the Code, as it is to a valid reference under the statutes relating to the reference of claims against executors and administrators. *Bucklin v. Chapin*, 35 How. 155; S. C., 53 Barb. 488.

Strictly speaking, the consent of the parties to refer should be reduced to writing, and signed by them or their attorneys; but in practice the rule is not enforced in all its strictness, and, although a written consent to refer is in all cases necessary, it is not necessary that this consent be subscribed by the parties or their attorneys. It will be a sufficient compliance with the statute if the parties, or their attorneys, give an oral assent to a

 Proceedings to obtain reference by consent — Form of consent to refer.

reference, in open court, and this consent is entered by the clerk in the minutes of the court; or if a similar consent is made before referees, and entered by them in their minutes; or if an order of reference is entered with the assent of the parties in open court, as in either case such entry will be deemed their written consent to the reference. *Waterman v. Waterman*, 37 How. 36; *People v. McGinnis*, 1 Park. Cr. 387; *Bucklin v. Chapin*, 35 How. 155; S. C., 53 Barb. 488; *Leaycroft v. Fowler*, 7 How. 259; *Keator v. The Ulster & Delaware Plank Road Co.*, 7 id. 41. See *ante*, 245, 246.

The consent need not be given by the parties in person, but may be given by their attorneys. Generally speaking, an attorney of record has authority to refer a cause. If he exceeds his authority the other party will not be permitted to be prejudiced, but the client will be held to the consent so given, and must seek his remedy against his attorney. *Smith v. Troup*, 7 Man., Gr. & Scott, 757; S. C., 6 D. & L. 679; *Fariell v. Eastern Counties R. R. Co.*, 2 Exch. 344; S. C., 6 D. & L. 54.

Whatever irregularities there may be in the mode of giving consent to the reference of a cause, all objections thereto will be waived if the parties appear before the referee and proceed with the reference. *Keator v. Ulster Plank Road Co.*, 7 How. 41; *Garcie v. Sheldon*, 3 Barb. 232; *Quinn v. Lloyd*, 7 Rob. 157; *Bucklin v. Chapin*, 35 How. 155; S. C., 53 Barb. 488.

Ordinarily, the parties or their attorneys should select a proper person to act as referee, and stipulate in the consent for a reference that the cause be referred to him; and an order will be made that the cause be so referred, as a matter of course. Code, § 273. But where some of the parties are infants or absentees, or where the object of the action is to procure a divorce, the name of the proposed referee should not be inserted in the consent. See Code, § 273; Rule 87 of Sup. Ct., N. Y. Gen. Term; 13 How. 346; *Litchfield v. Burwell*, 5 id. 341; S. C., 9 N. Y. Leg. Obs. 182; 1 Code R. N. S. 42.

Form of consent to refer.

(Title of cause.)

It is hereby agreed and stipulated by the parties to this action that the right to a trial by jury be waived, and that it be referred to _____, counselor at law, to hear and determine the issues in this cause; and that an order may be entered accordingly.

(Date.)

(Signatures.)

Application for order.

b. Application for order. The consent for a reference having been drawn up and signed by the parties or their attorneys, it should be presented to the court at special term, accompanied by an order of reference properly drawn, and lacking only the judge's signature. The order will be granted as of course, if none of the parties are infants or absentees, and the action is not for divorce. Code, § 273.

If some of the parties are infants or absentees, or if the parties cannot agree upon a proper person to act as referee, a similar application must be made, whereupon the court will appoint one or more referees, not exceeding three, who shall be free from exception. Code, § 273.

The application must be made on the usual notice of eight days, unless the parties waive such notice by agreement or voluntary appearance before the court. Both parties have a right to be heard upon the application. Except in actions for divorce no person can be appointed referee to whom all the parties in the action shall object. *Ib.*

In all cases the application must be made to the court at special term. A judge out of court or at chambers has no power to appoint a referee. *Scudder v. Snow*, 29 How. 95.

c. Form and entry of order. It is customary upon an application for an order of reference, to present to the court an order properly drawn together with the written consent of the parties. If for any reason this practice is not followed, the counsel should see that the decision of the court allowing the reference is properly incorporated into an order and duly entered with the clerk. *Scudder v. Snow*, 29 How. 95. The judge usually appends his initials to the order with a direction to the clerk to enter, whereupon the clerk enters the order and furnishes the counsel with a certified copy. In all cases it is absolutely indispensable to the regularity of the subsequent proceedings before the referee, that the order directing the reference and appointing the referee should be regularly made and entered. *Bonner v. McPhail*, 31 Barb. 106; *Scudder v. Snow*, 29 How. 95; *Litchfield v. Burwell*, 5 id. 341; S. C., 1 Code R. N. S. 42; 9 N. Y. Leg. Obs. 182. Courts of justice speak only through their records, orders, and entries upon their journals or minutes; and before a person can be clothed with the powers and authority of a referee in a pending action, and proceed to execute its duties, there must be a decision of the court signified by an entry or order upon its

Application for order.

minutes. No referee should proceed a step in the exercise of his duties without a certified copy of this rule or order in his hands ; this is his commission, and without it he should not act. *Ib.*

Where parties have appeared before a referee, upon a written consent, and have taken part in the proceedings upon the reference, any irregularity in obtaining or entering the order will be waived, and an order may be made and entered *nunc pro tunc*. *Bucklin v. Chapin*, 35 How. 155 ; S. C., 53 Barb. 488 ; *Whalen v. Board of Supervisors of Albany Co.*, 6 How. 278 ; *Bonner v. McPhail*, 31 Barb. 106. But, while an order of reference, made after the report of a referee is filed, with the consent of both parties that it be entered *nunc pro tunc*, will render the proceedings regular and conclusive as to the parties, it may be doubted if a judgment entered upon such report would be conclusive as against the rights of third parties.

As a referee has no legal power to administer a judicial oath before the order appointing him has been duly made and entered, no witness can be punished for perjury committed on an examination before him while thus disqualified, and the subsequent entry of an order *nunc pro tunc*, by consent of the parties, will not relate back so as to give to an extra judicial oath the effect of an oath legally administered. *Bonner v. McPhail*, 31 Barb. 106.

The necessity of obtaining and entering an order of reference will appear also from the fact that although the parties have stipulated to waive a jury trial and refer the cause to a party designated, yet if no order of reference is previously obtained and entered, and either party fails to appear before the referee and take part in the proceedings on the reference, the report of the referee will be a nullity and will not support a judgment entered on it. *Scudder v. Snow*, 29 How. 95.

Where a reference is ordered upon a written stipulation to refer a cause to a person designated, the order must conform to the stipulation, and direct that the cause be referred to the person so designated, or it will be void as against a party failing to appear at the reference. *Haner v. Bliss*, 7 How. 246 ; *Billings v. Vanderbrek*, 15 id. 295. The irregularity will, however, be waived by the parties if they appear and take part in the proceedings before the referee. *Quinn v. Lloyd*, 7 Rob. 157.

The order must also be made and entered in due form. A

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Form of order upon consent to refer — Construction of the order.

memorandum made by a judge on his calendar, at the circuit, that a cause was "referred to A. B.," is not sufficient to constitute an order. *Bonner v. McPhail*, 31 Barb. 196. So a decision of the court, at special term, authorizing a reference will not be binding upon the parties, if not properly incorporated in the form of an order and duly entered, although the order may be contained in the judgment-roll and signed by a judge of the court. *Scudder v. Snow*, 29 How. 95.

Form of order upon consent to refer.

(*Title of cause.*)

(*At special term, etc.*)

On reading and filing the written consent of the parties to this action, and on motion of A. B., of counsel for (plaintiff or) defendant:

ORDERED: That it be referred to _____, Esq., of _____, counselor at law, to hear and determine the whole issues of this cause.

d. Service of order. Where an order of reference is entered on the consent of the parties, and both parties had notice of the motion for the reference, no service of the order on either party is necessary. *Moffat v. Judd*, 1 How. 193. A certified copy of the order should, however, be served upon the person appointed referee, as, unless this is done, he should refuse to take any step in the cause. *Bonner v. McPhail*, 31 Barb. 106.

e. Effect of the order. When a cause is referred to a referee to hear and decide the whole issue, he is invested by the order with all needful authority over the cause, over the issues, over the pleadings, over the process, and over the parties, to such extent as to preserve order, enforce obedience, and determine every thing which properly belongs to the trial of the action. He is, in fact, invested by the order with the same power as a judge holding a special term, and stands in the place of the court clothed with similar powers. See Code, § 272; *Graves v. Blanchard*, 4 How. 300; S. C., 3 Code R. 25.

f. Construction of the order. Where an order is made referring "this cause," this is in effect a reference of the whole issue, and of every question of law or fact arising therein. *Renouil v. Harris*, 1 Code R. 125. A reference of the whole issue includes the taking of an account where that is a part of the relief to be had on the finding of an issue for the plaintiff. *Crosbie v. Leary*, 6 Bosw. 312.

Appeal from order — Proceedings to obtain compulsory reference.

g. Appeal from order. It is a general rule that an order which directs a reference in a case in which a reference is not authorized by law, is appealable. *Kain v. Delano*, 11 Abb. N. S. 29; *Whitaker v. Desfosse*, 7 Bosw. 678; *Thompson v. Seimer*, 40 How. 246; *Cram v. Bradford*, 4 Abb. 193. But as all actions are referable upon consent, the rule does not apply to orders upon stipulation of the parties. *Ib.* If, however, upon a stipulation to refer a cause to A., the cause was, by mistake or inadvertence, referred to B., the order may be corrected. The party aggrieved has his remedy by motion to remove the referee, or he may disregard the order entirely, and proceed to trial and inquest before the court as if no consent to any reference had been given. See *Haner v. Bliss*, 7 How. 246; *Quinn v. Lloyd*, 7 Rob. 157.

Section 4. Proceedings to obtain compulsory reference.

a. When to make application. An application for an order for a compulsory reference should not be made until the cause is in a condition to be referred; and no cause is referable until it is in readiness for trial. *Hawkins v. Avery*, 32 Barb. 551; *Wheeler v. Falconer*, 7 Rob. 45; *Jansen v. Tappen*, 3 Cow. 339; *Dutcher v. Wilgus*, 2 How. 180; *Goodyear v. Brooks*, 4 Rob. 682; S. C., 2 Abb. N. S. 296.

Thus an action for the foreclosure of a mortgage is not in a condition to have all the issues therein referred, while any defendants, against whom the plaintiff seeks a judgment over for a deficiency, have not been served with a summons, or have been served with a notice that no personal claim is made against them, and have not appeared. *Goodyear v. Brooks*, 4 Rob. 682; S. C., 2 Abb. N. S. 296.

So an application for a reference will be premature while there is an issue of law pending and undetermined. *Jansen v. Tappen*, 3 Cow. 339.

But either party may move for a general reference immediately upon the joinder of issue, although the time allowed for the adverse party to serve an amended pleading, as of course, has not expired. *Enos v. Thomas*, 4 How. 290; S. C., 2 Code R. 148. A subsequent amendment of the pleadings cannot defeat a motion for a reference, unless by such amendment there ceases to be an issue of fact or law between the parties. *Ib.* See Code, § 172.

The motion should be made before notice of trial, as it will

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Where application should be made — Notice of motion to refer.

be granted, after such notice has been given, only upon the payment of the costs which the adverse party has incurred in preparing for trial. *Fish v. Wright*, 5 Cow. 269.

The application for a reference should not be unreasonably delayed, as such delay, if unexplained, will cause the application to be viewed with suspicion. *Wheeler v. Falconer*, 7 Rob. 45.

b. Where application should be made. A motion for a reference in an action is a non-enumerated motion, as defined by rule 47 of the supreme court, and must be made at a special term. *Conway v. Hitchins*, 9 Barb. 378; Code, § 271; *Scudder v. Snow*, 29 How. 95. The general term may also order a reference in certain cases to determine a question for its own information, as where an appeal has been taken from that part of a judgment for a divorce which fixes the alimony, an order of reference may be granted to determine what would be a suitable amount. *Forrest v. Forrest*, 25 N. Y. (11 Smith) 501.

c. Notice of motion. A motion for a reference in an action is a non-enumerated motion and must be made upon a notice of eight days to the adverse party, according to section 402 of the Code. *Conway v. Hitchins*, 9 Barb. 378. The court may, however, dispense with all notice, and order a reference on its own motion, independently of any application by the parties. *Church v. Freeman*, 16 How. 294; Code, § 271. This power exists, however, only where the action is by its nature referable.

It was formerly the rule that the notice of motion to refer a cause should contain the names of three referees. *Gott v. Owen*, 7 Hill, 155; *Lusher v. Walton*, 1 Cai. 149; *Bedle v. Willett*, id. 7. The rule is, however, obsolete. See rule of general term, 13 How. 346.

Notice of motion to refer.

(Title of cause).

Please take notice, That on the affidavit, a copy of which is herewith served on you (and on the pleadings in this action), I shall move the court at a special term to be held at _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, that his action be referred to one or more referees, and for such other and further relief as may be just.

(Date.)

(Address.)

(Signature.)

d. Affidavits. The motion for an order of reference should be made upon an affidavit, or upon an affidavit and the pleadings. The affidavit should show the nature of the action, in order that the court may see that it is one in which an order of reference may be properly granted. It should also show the condition of the action, and allege in clear and positive terms that all the issues, whether of law or fact, have been joined. *Goodyear v. Brooks*, 4 Rob. 682; S. C., 2 Abb. N. S. 296; *Dutcher v. Wilgus*, 2 How. 180; *Jansen v. Tappen*, 3 Cow. 34. It should also show that the trial of such issues will necessarily require the examination of a long account, and, also, how and in what way their examination will become necessary upon the trial. *Kain v. Delano*, 11 Abb. N. S. 29; *Keeler v. Poughkeepsie & Salt Point Plank Road Co.*, 10 How. 11.

If the motion is made upon the pleadings and affidavits, and the pleadings are duly verified and show, *prima facie*, that the trial will require the examination of a long account, the court may grant the order upon the proof so presented. *Holmes v. Bennett*, 28 How. 289.

It is not necessary that the affidavit should show that the investigation will not require the decision of difficult questions of law, as this is a matter of defense to the motion which the moving party is under no obligation to anticipate. *Barber v. Cromwell*, 10 How. 351. Neither is it necessary that the affidavit should show the place of trial. *Feeter v. Harter*, 7 Cow. 478; *Cleveland v. Strong*, 2 id. 448.

The affidavit upon which to move for an order of reference should be made by the party himself, or a sufficient excuse should be given for his not making it. *Mesick v. Smith*, 2 How. 7; *Ross v. Beecher*, id. 157; *Wood v. Crowner*, 4 Hill, 548; *Little v. Bigelow*, 2 How. 164. But this rule applies only where the motion is made upon an affidavit alone. Where the application for the order is made both upon an affidavit and the pleadings in the cause, the attorney may properly make the affidavit, showing the joining of the issues of fact in the action, and the place of trial, without making excuse for the fact that it is not made by the party. The fact that the trial of the issues of fact would require the examination of a long account may be made to sufficiently appear by the verified pleadings. *Holmes v. Bennett*, 28 How. 289.

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Form of affidavit — Form of affidavit of attorney, etc. — Practice on motion.

Form of affidavit.

(*Title of cause.*)

(*Venue.*)

A. B., the (*plaintiff*) in the above-entitled action, being duly sworn, says :

I. That the said action is brought to recover for work done by the plaintiff, as the factor and agent of the said defendant, in and about the selling and disposing of goods and chattels, and in and about other business of the said defendant, and for him and at his request.

II. That the issue was joined in the said action on the day of last, by the service of a reply to the answer of the defendant ; that the said answer sets up payment as to part of the plaintiff's demand, and a counter-claim arising out of numerous items of services alleged to have been rendered by him to the plaintiff, all of which allegations are denied by the reply.

III. That the trial of the aforesaid issues will necessarily involve the examination of a long account on the side of both plaintiff and defendant, consisting of at least items of charges and credits, in respect to the aforesaid services and payments, made at various dates and extending over a period of years.

(*Jurat.*)

(*Signature.*)

Form of affidavit of attorney, where motion is based on verified pleadings.

(*Title of cause.*)

(*Venue.*)

E. B., being duly sworn, says :

I. That he is the attorney for the plaintiff in the above-entitled action.

II. That issue was joined in the said action on the day of last, by the service of the defendant's answer, and that no demurrer to said answer has been served.

III. That the trial of the aforesaid issues will necessarily involve the examination of a long account, as will more fully appear by the pleadings in this action, copies of which are hereto annexed.

(*Jurat.*)

(*Signature.*)

e. Practice on motion. Upon the argument of the motion, the party upon whom the motion papers have been served may oppose the motion by counter affidavits, setting forth the reasons why the cause should not be referred. If the motion to refer is opposed upon the ground that difficult questions of law will arise, the opposing affidavit must set forth what such questions are, to enable the court to judge whether they are questions of real difficulty. *Dewey v. Field*, 13 How. 437; *Salisbury v.*

Practice on motion—Form of affidavit denying account.

Scott, 6 Johns. 329; *Lusher v. Walton*, 1 Cai. 149. See *Barber v. Cromwell*, 10 How. 351; *Anonymous*, 5 Cow. 423; *Shaw v. Ayrs*, 4 id. 52.

If the motion is opposed on the ground that the examination of a long account will not be involved in a trial of the issues, this fact should be made to clearly appear by affidavit, if it does not sufficiently appear from the pleadings. See *Kain v. Delano*, 11 Abb. N. S. 29.

The fact that the action sought to be referred is one not arising on contract may be shown by the pleadings, and will defeat the motion, notwithstanding that a trial of the issues may involve the examination of a long account. *Townsend v. Hendricks*, 40 How. 143. When this fact is made to appear, it will be unnecessary to call attention to other objections to the granting of the reference.

The motion may also be successfully opposed by showing, by the pleadings and affidavits, that the action can be tried by the court and a jury, in a reasonable time, and that the expenses and delays of a trial before a referee would be oppressive and a hardship in the particular case. See *Godfrey v. The Williamsburgh City Fire Ins. Co.*, 12 Abb. N. S. 250.

Each party should be prepared, upon the argument, with the name or names of one or more referees, in order that if the motion is granted the selection of a referee may be made by agreement between the parties, if possible, or, if not, by the court. If the parties agree, before the argument of the motion, upon some person to act as referee, in case a reference should be ordered, this agreement should be put in the form of a written stipulation, to be presented to the court; and, except in actions for a divorce, no person other than the one so nominated can be appointed referee in the cause. Code, § 273. If the parties do not so agree, the court will usually appoint some person nominated by one of the parties.

Form of affidavit denying account.

(Title of cause.)

(Venue.)

A. B., the plaintiff in the above-entitled action, being duly sworn, says:

I. That the issue joined herein will not require the examination of a long account within the meaning of the statute.

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Form of affidavit where there are difficult questions of law.

II. That this action is brought to recover for a bill of goods sold by plaintiff to defendant; and that all of said goods were sold at one time and as one transaction; and the alleged credit is a payment made by defendant at said time, and then deducted from the amount to be due from defendant to the plaintiff; and that there are no other items of charge or credit involved in the issues herein.

(*Jurat.*)

(*Signature.*)

Form of affidavit where there are difficult questions of law.

(*Title of cause.*)

(*Venue.*)

A. B., the plaintiff in the above-entitled action, being duly sworn, says:

I. That he has fully and fairly stated this cause to his counsel, E. B., who resides at ; and that the investigation and trial of the issues of fact in this cause will, as deponent is advised by said counsel, after such statement, and believes, require the decision of difficult questions of law.

II. That (*here state the nature of the issues, unless they are correctly stated in the moving affidavit*), and that the following will be insisted on on behalf of said plaintiff (*here state deponent's points of law*), and deponent is informed and believes that the defendant's counsel will urge (*here state the anticipated points*), which points, as deponent is advised by his said counsel, are material to the cause, and are difficult, especially in their application to this case.

(*Jurat.*)

(*Signature.*)

Affidavit where fraud is set up.

(*Title, venue and commencement, as above.*)

I. That this action is brought upon an insurance policy alleged to have been made by defendants; and that the only items of account are items of damage, which plaintiff claims he has sustained by a peril insured against.

II. That the defense set up by the defendants is fraud on the part of the plaintiff, as more fully appears by reference to the answer, a copy of which is hereto annexed.

(*Jurat.*)

(*Signature.*)

Form of stipulation agreeing on nomination.

(*Title of cause.*)

It is hereby stipulated and agreed between the parties hereto, that, in case the within motion be granted, the reference shall be to , Esq., of , counselor at law.

(*Date.*)

(*Signatures.*)

f. Reference, on motion of the court. Compulsory references are usually ordered upon the application of some one of the parties, although the court has power, in all cases where such reference may be ordered, to refer the cause on its own motion. Code, § 271. The reference in such case may be to hear and decide the whole issue, or to report upon any specific question of fact involved therein, or to take an account. *Ib.* The whole issues are, however, seldom referred by the court on its own motion. See *Barron v. Sanford*, 14 How. 443; S. C., 6 Abb. 320, *note*; *Van Zant v. Cobb*, 10 How. 348.

g. Appeal from order. An order directing a compulsory reference may or may not be appealable, the decision of this question depending upon the nature of the action in which the order was made, and also upon the proof upon which it was based. If a reference is ordered in a case clearly unauthorized by law, as for instance, in an action for libel, false imprisonment, or other wrong, or where the claim consists of only one or two items, the order would affect a substantial right, and would, therefore, be appealable. *Kain v. Delano*, 11 Abb. N. S. 29; *Thompson v. Seimer*, 40 How. 246; *Dickinson v. Mitchell*, 19 Abb. 286; *Harris v. Mead*, 16 *id.* 257; *Whitaker v. Desfosse*, 7 Bosw. 678; *Cram v. Bradford*, 4 Abb. 193; *Gray v. Fox*, 1 Code R. N. S. 334. But where the action is referable in its nature, and either by reason of a conflict of proofs, or otherwise, it is doubtful whether the examination of a long account is involved or not, the judge to whom the application is made may exercise his discretion in the premises, and his order is final, and cannot be reviewed on appeal. *Kain v. Delano*, 11 Abb. N. S. 29; *Thompson v. Seimer*, 40 How. 246; *Hatch v. Wolfe*, 30 *id.* 65; S. C., 1 Abb. N. S. 77; *Whitaker v. Desfosse*, 7 Bosw. 678; *Ubsdell v. Root*, 1 Hilt. 173; S. C., 3 Abb. 142; *Kennedy v. Shilton*, 1 Hilt. 546; S. C., 9 Abb. 157, *note*; *Smith v. Dodd*, 3 E. D. Smith, 348; *Gray v. Fox*, 1 Code R. N. S. 334. But in order to render the decision of the court in granting the order conclusive and final, so as to prevent an appeal, there must be some evidence showing that the trial of the issues in the action will require the examination of a long account; for, while an appellate court will not sit in judgment upon a question of fact passed upon by the court below, upon competent evidence fairly calling for the exercise of the judgment of that court, it will review the decision of such court where it appears that no facts were shown

which presented a question for judicial determination. *Kain v. Delano*, 11 Abb. N. S. 29; *Whitaker v. Desfosse*, 7 Bosw. 678.

Section 5. Order of reference.

a. General. As has been previously stated, an order of reference should, in all cases, be obtained and entered before proceeding with the reference, even when the reference is upon a written consent. *Bonner v. McPhail*, 31 Barb. 106; *Scudder v. Snow*, 29 How. 95; *Litchfield v. Burwell*, 5 id. 341; S. C., 1 Code R. N. S. 42; 9 N. Y. Leg. Obs. 182. In the absence of such order, either party may refuse to appear before the referee, and no advantage can be taken of the default, even though due notice of the trial was served upon the party so absenting himself. *Scudder v. Snow*, 29 How. 95. Should the parties appear, and the testimony of witnesses be taken, no witness could be punished for perjury committed before a referee who was not clothed with authority to administer an oath by an order of the court appointing him. *Bonner v. McPhail*, 31 Barb. 106. The right to a jury trial may be waived by the appearance of the parties before a referee who was not duly appointed by the court, and an order may be made and entered *nunc pro tunc* after the referee has made his report. *Bucklin v. Chapin*, 35 How. 155; S. C., 53 Barb. 488; *Whalen v. Board of Supervisors of Albany Co.*, 6 How. 278. But the entry of such order will not affect a party who has not appeared, nor will it give to an extra-judicial oath the effect of an oath legally administered. *Scudder v. Snow*, 29 How. 95; *Bonner v. McPhail*, 31 Barb. 106.

b. Form and contents of order. A reference under the Code, when intended as a substitute for a trial of issues by a court or jury, may be ordered for two purposes: *First*. It may be for the decision of all the issues, and the determination of the entire controversy; and, *second*, it may be merely to ascertain the facts, and report them to the court for its decision and final judgment thereon. The Code authorizes a compulsory reference where the trial of an issue of fact will require the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issues, or to report upon any specific question of fact involved therein. Code, § 271. In either case, the referee stands in the place of the court, and the general rules applicable to the one case are equally applicable to the other. A distinction, however, exists in respect to the form of the order of appointment in the two cases, which must not be

Form of order of reference on motion — Entry and service of order.

overlooked. If the reference is intended merely for the purpose of informing the court upon any specific question of fact, the order directing the reference should clearly indicate this intention, as, in the absence of words showing this intent, the reference will be deemed to embrace the whole issue. See *Renouil v. Harris*, 2 Sandf. 641; 1 Code R. 125.

In cross actions, and upon cross applications for a reference, the court will sometimes order a joint reference; and where the respective parties reside in different places will direct in the order that the referee hold meetings in different places to accommodate the parties. *Hart v. Trotter*, 4 Wend. 198.

If the parties have stipulated that the cause be referred to a particular person, the order must conform to the stipulation, except in actions for a divorce. Code, § 273.

Form of order of reference on motion.

(*Title of cause.*)

(*At a special term, etc.*)

On reading and filing the affidavit of A. B. (and the pleadings in this action), and on motion of Y. Z., counsel for the plaintiff, and after hearing M. N., counsel for the defendant (or on proof of due service of notice of motion and no one appearing), in opposition:

ORDERED: That it be referred to _____, Esq., counselor at law, to hear and determine the whole issues in this cause.

Form of order of reference by the court of its own motion.

(*Title of cause.*)

(*At a circuit, etc.*)

This cause coming on to be tried, and it appearing to the satisfaction of the court that it will require the examination of a long account:

ORDERED: That it be referred to _____, Esq., of _____, counselor at law, to hear and determine the whole issues in this cause.

c. Entry and service of order. Upon a motion for a reference, the mere oral decision of the court that the cause be referred is of no avail unless that decision is incorporated in an order. The only judicial mode of determining a motion is by an order, and this must be made a record. *Smith v. Spalding*, 3 Rob. 615; S. C., 30 How. 339. It is the business of the counsel to see that the decision of the court, at special term, is properly incorporated in an order, and duly entered with the clerk to make it effective. *Scudder v. Snow*, 29 How. 95. The order being duly drawn up

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Effect of order — If all object, referee not appointed.

by the moving party, and signed by the court with a direction to the clerk to enter, the counsel should next present the order to the clerk, who will thereupon enter it in the minutes, and give to the moving party a certified copy of it.

A certified copy of the order should be thereupon served upon the referee, as it is his commission, without which he should refuse to proceed with the reference. *Bonner v. McPhail*, 31 Barb. 106.

It is not necessary that a copy of the order should be served upon the adverse party. The application for the order being made on notice, the opposing party is charged with notice of the decision of the motion. *Moffat v. Judd*, 1 How. 193.

d. Effect of order. The sole effect of an order of reference is to determine the mode of trial, and it no more involves the merits than an order changing the place of trial. *Bryan v. Brennon*, 7 How. 359. It, however, deprives a party of a substantial right secured to him by the constitution, and if the order has been improvidently granted, he has still his remedy by appeal. *Kain v. Delano*, 11 Abb. N. S. 29. But if the court granting the order has made a proper exercise of its discretion, the referee, by such order, becomes invested with all the authority over the cause which was formerly vested in the court, and his report upon the whole issues stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. Where the reference is to report the facts, his report has all the effect of a special verdict. Code, § 272.

There are several reported decisions to the effect that, notwithstanding the order of reference, for every purpose except the trial, the action and parties remain in court. *Billings v. Baker*, 6 Abb. 213; *Holmes v. Slocum*, 6 How. 217; S. C., 1 Code R. N. S. 380; *Mathews v. Jones*, 1 E. D. Smith, 429. How far these decisions are binding as authorities, under the subsequent amendments of sections 272 of the Code and the present rules of court, will be considered in discussing the powers of referees. See art. 2, *post*; see, also, *Stephens v. Strong*, 8 How. 339; *Sage v. Mosher*, 17 id. 367; *Williams v. Sage*, 1 Code R. N. S. 358; Rule 39, Sup. Ct.

e. If all object, referee not appointed. Except in actions for a divorce, the court has no power to direct a reference to any person to whom all parties shall object. Code, § 273.

Section 6. Waiver of irregularity in proceeding.

a. Reference by consent. It may be stated, as a general rule, that proceeding upon a reference is a waiver of all objections because of irregularities, and that the appearance before the referee, the trial of the claim presented, and a report thereon, are all that are necessary to justify the entry of a judgment. All the preliminary steps may be supplied *nunc pro tunc*. *Bucklin v. Chapin*, 35 How. 155; S. C., 53 Barb. 488; *Whalen v. Board of Supervisors of Albany County*, 6 How. 278; *Bonner v. McPhail*, 31 Barb. 106; *Andrews v. Elliott*, 5 Ell. & Bla. 502; S. C., 32 Eng. Law & Eq. 311; *Quinn v. Lloyd*, 7 Rob. 157; *Garcie v. Sheldon*, 3 Barb. 232.

But this rule applies only to objections on the ground of irregularities. Proceeding upon a reference is no waiver of the objection that the court had no jurisdiction to make the order under which the cause was referred. This question may be raised at any time. *Garcie v. Sheldon*, 3 Barb. 232. See *Haner v. Bliss*, 7 How. 246; *Scudder v. Snow*, 29 id. 95.

b. Compulsory reference. The rule as to the waiver of irregularities, on a reference by consent, applies equally to objections to irregularities on a compulsory reference. If a party appears and proceeds upon a reference, he will be deemed to have waived all objections to the order of reference on the ground of irregularity, but not of the objection that the court had no jurisdiction to make the order. *Garcie v. Sheldon*, 3 Barb. 232; *Haner v. Bliss*, 7 How. 246. As the law only authorizes a compulsory reference in a single class of cases, viz., those actions in which a trial of an issue of facts will require the examination of a long account, and, as the constitution secures to a party a trial by jury in all other cases, it follows that the court has no jurisdiction to make an order directing that an action be referred for trial, without the consent of the parties, except where such action falls within the single class of cases mentioned; and when an order is made, referring an action which is not, from its nature, referable, without the consent of the parties, the granting of the order is not a mere irregularity, and an objection that the order was improperly granted will not be waived by appearing and proceeding with the trial. *Kain v. Delano*, 11 Abb. N. S. 29.

c. Disregarding order. The Code provides that, in all cases of reference, the parties as to whom the issues are joined in the action (except when the defendant is an infant or an absentee)

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may agree in writing upon a person or persons not exceeding three, and a reference shall be ordered to him or them, and to no other person or persons. Code, § 273. When the parties to an action, referable only by consent, have entered into a written stipulation through their respective attorneys, to refer the cause to a person specified, and, through inadvertence or mistake, an order is made directing a reference to some other party, the order so made will be a nullity, and either party may disregard it and proceed to trial or inquest as if no consent to any reference had been given. *Haner v. Bliss*, 7 How. 246. See *Quinn v. Lloyd*, 7 Rob. 157. In the case last cited it was held, that appearing before the referee so appointed, and proceeding with the reference without objection, was a waiver of the "irregularity." Whether the action was one in which a compulsory reference could be ordered without the consent of parties does not appear from the case as reported.

Section 7. Who appointed referee.

a. In general. It is nearly a universal practice, in ordinary actions in which a reference is ordered, to appoint a referee from among the counselors or clerks of the court, on account of their presumed fitness for the position, and their knowledge of the requirements of the office. But when the issues of fact to be tried involve questions of mechanical science, rather than questions requiring legal learning and skill, a reference is sometimes ordered to some person skilled in that particular science. Thus, in an action in which the rights of the parties depended upon the determination of the extent of a reservation in a grant of a water privilege, the court advised a reference to one or more suitable referees, one of whom should be a capable engineer or millwright. *Olmstead v. Loomis*, 9 N. Y. (5 Seld.) 423, 430. So, in a case relating to the settlement of the estate of a deceased merchant, the whole issues were referred, by consent of parties, to three referees, two of whom were lawyers and the other a merchant. *Roosevelt v. Thurman*, 1 Johns. Ch. 220.

The person chosen as referee should be one who is free from interest, prejudice or bias, and not a near relative of any of the parties to the action. The reason of this rule is obvious; for, while a person appointed referee might not be influenced in favor of one of the parties by reason of interest or relationship, still the desire to avoid any supposed partiality might exert an influence to the contrary. But if parties, with knowledge of the

fact, select a referee who is interested in the subject-matter of the action, they will nevertheless be bound by his decision. *Matthew v. Ollerton*, 4 Mod. 226; S. C., Comb. 218; Hard. 44.

Except where an infant or an absentee is a party, the parties have an absolute right to select the referee; and where a person has been agreed upon by a written stipulation, the court has no authority to refer the cause to any other person. Code, § 273; *Haner v. Bliss*, 7 How. 246. But, if the parties do not so agree, the court may appoint one or more referees who are free from exception, and to whom some of the parties do not object. Except in actions for divorce, no person can be appointed referee to whom all the parties in the action object. Code, § 273.

Where both parties move for a reference, and fail to agree upon the person to be appointed referee, the court will give preference to the nomination of the party first giving notice of the motion. *Graham v. Wood*, 1 Wend. 15.

b. Judge as referee. The Code provides that no judge or justice of any court shall sit as referee in any action pending in the court of which he is judge or justice, and not already referred, unless the parties otherwise stipulate. Code, § 273.

The constitution of the State also declares that no judicial officer, except justices of the peace, shall receive to his own use any fee or perquisite of office; nor shall any judge of the court of appeals, justice of the supreme court, or judge of a court of record, in the cities of New York, Brooklyn or Buffalo, practice as an attorney or counselor in any court of record in this State, or act as referee. Const. N. Y., art. 6, § 21.

This prohibition does not apply to a commissioner of appeals. *Settle v. Van Evrea*, 49 N. Y. (4 Sick.) 280.

c. Residence of referee. Under the old system of practice it was held that the persons appointed as referees must reside in the county in which the venue is laid in the action in which application is made for a reference. *Chubb v. Berry*, 7 Wend. 483; *Sherwood v. Trumper*, 11 Johns. 406. Under the present practice the residence of the referee is not deemed of any importance.

d. In actions for divorce. In actions for divorce, as in every other action where the defendant is not an infant or an absentee, the parties may, by written stipulation, agree upon a person to act as referee, and the court must make the appointment accordingly. Code, §§ 270, 273.

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Number of referees — General powers of referees — Limited by statute.

But where the parties fail to agree as to the person to be appointed referee, the court is unrestricted in its power of selection, and may appoint as referee any person except one to whom all the parties object. Code, § 273. In cases of default, in actions of this nature, the court will not order the reference to a referee nominated by either party. Rule 87, Sup. Ct. See *Simmons v. Simmons*, 3 Rob. 642.

e. Number of referees. By the practice of the court under the old system, the party moving for a reference nominated three referees to whom it was proposed to refer the cause. The opposite party then had the right to strike out the name of one of the persons proposed, and substitute another in his stead, leaving two originally named, who were appointed by the court unless cause was shown to the contrary. *Graham v. Wood*, 1 Wend. 15. This practice may be still followed where the parties fail to agree upon a referee or referees.

The Code provides that the number of referees shall in no case exceed three. Code, § 273. And, although three referees may be appointed in all cases of reference under the Code, the practice is falling into disuse, and in nearly every case the cause is referred to a single referee.

ARTICLE II.

GENERAL POWERS OF REFEREES.

Section 1. In general.

a. Limited by statute. In considering the powers of a referee, the object for which he was appointed or the nature of the reference must be kept continually in view. Where a reference is made to a referee, simply to take and state an account, he is a mere substitute for a master in chancery, and must conform in his proceedings to the old chancery practice, which is still retained in force in certain cases by section 469 of the Code, and rule 97 of the supreme court. *Palmer v. Palmer*, 13 How. 363; *Ketchum v. Clark*, 22 Barb. 319. Under the old chancery practice, a master's report was disregarded when it exceeded the terms of the reference; and the master had no power to dispense with or relax the general orders of the court. *Smith v. Webster*, 3 Mylne & Cr. 244. The same rules apply to referees under the Code.

But where by the order of reference the whole issues are referred, the referee by the consent and act of the parties, and by operation of law, is substituted in the place of the court. The trial is to be had before him, as before one of the judges of the court, and for the purposes of the trial and its disposition, he has, for the time being, the ordinary powers of the court. *Palmer v. Palmer*, 13 How. 363. Section 272 of the Code declares that "The trial by referees shall be conducted in the same manner and on similar notice as a trial by the court. They shall have the same power to grant adjournments and to allow amendments to any pleading and to the summons, as the court upon such trial, upon the same terms and with the like effect. They shall have the same power to preserve order and punish all violation thereof upon such trial, and to compel the attendance of witnesses before them by attachment, and to punish them as for a contempt for non-attendance, or refusal to be sworn, or to testify, as is possessed by the court. They must state the facts found and the conclusions of law separately, and their decision must be given, and may be excepted to and reviewed in like manner, and with like effect in all respects as in cases of appeal under section 268; and they may in like manner settle a case or exceptions. The report of the referees upon the whole issues shall stand as the decision of the court, and judgment may be entered thereon, in the same manner as if the action had been tried by the court." This section confers upon the referee complete jurisdiction over the cause, as much so as any judge could possess at special term for its trial; and the mode of conducting the trial is within the discretion of the referee, so far as relates to all questions within the ordinary discretion of a judge on the trial of a cause. *Palmer v. Palmer*, 13 How. 363.

But notwithstanding that the statute has conferred upon referees, to whom the whole issue is referred, the power of a court at special term, it is only by force of the statute that the referee has any power whatever. Referees, like all other inferior and subordinate tribunals, in regard to questions of jurisdiction, are mere creatures of the statute. Their powers in that respect are special and limited. They possess no powers by implication, but are confined strictly to the powers expressly conferred. *Billings v. Baker*, 6 Abb. 213.

b. Bound by decisions. A referee has no right to disregard the decision of the court at general term upon the express point

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before him. Decisions so pronounced are authoritative upon the questions presented, and are binding upon both judges of the court and referees, and upon all other subordinate tribunals, until overruled by a subsequent decision at general term, or overruled by the court of appeals. A report of a referee, and the judgment entered thereupon, will be reversed if it is in conflict with a decision of the court at general term. *Burt v. Powis*, 16 How. 289; *Hardenburgh v. Crary*, 50 Barb. 32. See *Billings v. Vanderbrek*, 15 How. 295.

c. Must act in proper person. A referee must act in his own proper person in the trial of a cause referred to him, and cannot delegate his authority, or act by proxy any more than a judge or juror. *Shultz v. Whitney*, 9 Abb. 71; S. C., 17 How. 471. Thus, where a referee is employed to make a sale, he must at least be present at the sale, and have the immediate direction of the same, even though he employs an auctioneer; and even where a sale is fairly made by a competent agent deputized for that purpose by the referee, the sale will be set aside if it appears that the same was not made in the presence of the referee. *Heyer v. Deaves*, 2 Johns. Ch. 154.

d. Improper influence. The right of litigants to have the unbiased judgment of the jury upon the evidence openly produced before them has always been guarded with the most jealous watchfulness by the courts. Whenever it has been seen that by any means or influence beyond what has transpired upon the trial, and in the presence of the parties, the minds of the jury may have been operated on with reference to their verdict, it has been deemed sufficient ground for granting a new trial. As a referee takes the place of a jury as well as of the court, and as his decision upon questions of fact is, like that of a jury, as a general rule, conclusive, the courts have held that the same rule of law which protects parties from any undue influence upon the minds of jurors, should be substantially applied to referees, and that, if it can be made to appear that the successful party unduly influenced the referee even in the slightest degree, the report will be set aside. *Dorlon v. Lewis*, 9 How. 1; *Roosa v. Saugerties & Woodstock Turnpike Road Co.*, 12 id. 297; *Yale v. Gwinits*, 4 id. 253.

Thus, where a referee, in the absence and without the consent of the adverse party, personally examined a piece of machinery, the utility of which was the subject of litigation, and during

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such examination received explanations from the witnesses of one of the parties, this was held a sufficient ground for setting aside the report. *Yale v. Gwinits*, 4 How. 253.

So where the referee had repeated conversations with each of the attorneys, in the absence of the other, in relation to the questions pending before him, his report was set aside on the ground that such conversations might have exercised an undue influence upon his mind, and affected his decision. *Dorlon v. Lewis*, 9 How. 1.

But while the report of a referee may and should be set aside upon even the slightest proof of improper dealings between him and the *successful* side, provided such dealings are shown to have a tendency, no matter how remote, to influence the action of the referee in favor of such party, a report will not be set aside upon mere suspicion and surmise, founded upon previous improprieties with the unsuccessful side. *Gray v. Fisk*, 12 Abb. N. S. 213; S. C., 42 How. 135.

e. Striking out complaint. A referee has power under the Code to dismiss an action upon the ground that the complaint does not state facts sufficient to constitute a cause of action. *Coffin v. Reynolds*, 37 N. Y. (10 Tiff.) 640; S. C., 5 Trans. App. 74.

So upon the hearing the plaintiff may submit to a nonsuit or dismissal of his complaint, or may be nonsuited or his complaint be dismissed in like manner as upon a trial, at any time before the cause has been finally submitted to referees for their decision. Rule 39, Sup. Ct.

Under the provisions of section 390 of the Code, a party to an action may, at the instance of the adverse party, be compelled by the process of *subpœna duces tecum*, not only to appear at the trial and submit to a personal examination, but to produce books and papers in his possession, precisely as any other witness may be so compelled; and if he fails or refuses to appear and testify, or to produce books and papers, when properly subpœnaed for that purpose, he may be punished as for a contempt, and his complaint, answer or reply may be stricken out under the provisions of section 394 of the Code. *Bonesteel v. Lynde*, 8 How. 226; S. C. affirmed, 8 id. 352; *Central National Bank of the city of New York v. Arthur*, 2 Sweeny, 194; *Mitchell's Case*, 12 Abb. 244; *Commercial Bank of Albany v. Dunham*, 13 How.

Amending complaint.

541; *Stalker v. Gaunt*, 12 N. Y. Leg. Obs. 124; *People v. Dyckman*, 24 How. 222.

Section 272 of the Code provides that referees shall have the same power to compel the attendance of witnesses before them by attachment, and to punish them as for a contempt for non-attendance, or refusal to be sworn or testify, as is possessed by the court. Under the authority given by this section and sections 390, 394 of the Code, a referee may strike out the complaint, answer or reply of a party who fails to appear and testify, either orally or by the production of documents in his possession, after having been properly subpoenaed for that purpose.

f. Amending complaint. Section 272 of the Code confers upon referees the same power to allow amendments to any pleadings, etc., as is possessed by the court upon trial, upon the same terms and with like effect. *Bennett v. Lake*, 47 N. Y. (2 Sick.) 93.

Section 173 of the Code confers power upon the court, in furtherance of justice and upon such terms as may be proper, to amend any pleading, process or proceeding by adding or striking out the name of any party; or by correcting a mistake in the name of a party; or a mistake in any other respect; or by inserting other allegations material to the case; or where the amendment does not change substantially the claim or defense, by conforming the pleadings to the facts proved.

This power to allow amendments is derived wholly from the Code, as, prior to that act, a referee had no power to grant any amendments to the pleadings in an action pending before him. *Ford v. Ford*, 53 Barb. 525; S. C., 35 How. 321.

It has been held that referees have no power to allow amendments to pleadings under section 173 of the Code, and that their power of amendment is confined to immaterial variances arising on the trial under sections 169 and 170 of the Code. *Union Bank v. Mott*, 18 How. 506; S. C., 10 Abb. 372. This limitation of the power of a referee is not, however, in accordance with the language of section 272 of the Code, nor is it sustained by the court of last resort. *Bennett v. Lake*, 47 N. Y. (2 Sick.) 93; *Milvin v. Wood*, 4 Abb. N. S. 438; S. C., 3 Trans. App. 297; 3 Keyes, 533. See *Woodruff v. Dickie*, 31 How. 164; S. C., 5 Rob. 619.

It has also been held that a referee has no power to permit an amendment to a pleading setting up a new cause of action or defense. *Ford v. Ford*, 35 How. 321; S. C., 53 Barb. 525; *Union Bank v. Mott*, 18 How. 506; S. C., 10 Abb. 372; *Woodruff v.*

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Dickie, 31 How. 164; S. C., 5 Rob. 619. The current and weight of authorities are, however, to the reverse of this rule, and it may be laid down as a rule that the court, or a referee, may permit an amendment to a pleading, by the insertion of a new cause of action or a new defense. *Secor v. Law*, 9 Bosw. 163; S. C. affirmed, 3 Keyes, 525; 33 How. 618 *n*; *Union National Bank of Troy v. Bassett*, 3 Abb. N. S. 359; *Melvin v. Wood*, 4 id. 438; S. C., 3 Trans. App. 297; 3 Keyes, 533; *Van Ness v. Bush*, 14 Abb. 33; S. C., 22 How. 481; *Vibbard v. Roderick*, 51 Barb. 616; *Union Bank v. Mott*, 19 How. 267; S. C., 11 Abb. 42.

As the Code confers the same powers of amendment upon the referee as is possessed by the court upon a trial of a cause, a further discussion of the cases in which an amendment may be allowed, and the extent and character of the amendment, when allowed, may be found on page 169, *ante*. See vol. 2, 506 to 508.

g. Disregarding variances. The Code provides, that no variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits; and that, whenever it is alleged that the party has been so misled, the fact must be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just. Code, § 169.

It is also provided, that where the variance is not material, as provided in section 169, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. Code, § 170.

The powers thus conferred upon the court by sections 169 and 170 are also possessed to the same extent by referees. A referee, as well as a judge, may disregard any variance between the pleadings and proof, where it is clear that the adverse party has not been misled to his prejudice, or he may grant an amendment to the pleading conforming the complaint to the facts proved. *Dunnigan v. Crummev*, 44 Barb. 528; *Harmony v. Bingham*, 1 Duer, 209; *Hart v. Hudson*, 6 id. 294; *Union Bank v. Mott*, 18 How. 506; S. C., 10 Abb. 372.

But where the complaint sets up one cause of action, and the proof on the trial establishes another, the referee may properly dismiss the complaint in the absence of any application to amend the pleadings so as to conform to the proofs, or to apply the law

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to the undisputed facts, without reference to the allegations of the complaint. *Tracy v. Ames*, 4 Lans. 500. See *Short v. Barry*, 3 Lans. 143; 40 How. 210; 58 Barb. 177.

h. Compelling the attendance of witnesses. Referees have the same power to compel the attendance of witnesses before them by attachment, and to punish them as for a contempt for non-attendance, as is possessed by the court. Code, § 272.

Subpœna for reference.

The People of the State of New York to

Greeting:

WE COMMAND YOU AND EACH OF YOU, that (all and singular business and excuses being laid aside) you and each of you appear and attend before _____, referee, duly appointed under a rule of the court, on the _____ day of _____, 187, at _____ o'clock in the _____ noon, at _____, to be examined as a witness, at the instance of _____, in a certain action now pending in said court, then and there to be tried, between _____ plaintiff, and _____ defendant, and for a failure to attend, you will be deemed guilty of contempt of court, and liable to pay all loss and damages sustained thereby, to the party aggrieved, and forfeit \$50 in addition thereto.

Witness, _____, Esquire, judge or justice of our said court, the _____ day of _____, one thousand eight hundred and seventy-
_____, *Clerk.*

_____, *Attorney for* _____.

Subpœna ticket for reference.

By virtue of a writ of subpœna, to you directed and herewith shown, YOU ARE COMMANDED, that all business and excuses being laid aside, you appear and attend in your proper person, before _____, the referee appointed by the court, at _____, on the _____ day of _____, 187, at _____ o'clock in the _____ noon, to testify all and singular what you may know in a certain action now pending in the supreme court, and then and there to be tried between _____, plaintiff, and _____, defendant, on the part of the _____. And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss or damages sustained thereby to the party aggrieved, and forfeit \$50 in addition thereto.

Dated the _____ day of _____, 187.

By the court.

_____, *Attorney.*

To _____.

Where a person, who is in prison, is required as a witness before a referee, his presence may be compelled by a subpœna

habeas corpus ad testificandum. 2 R. S. 559 (580), § 3. See, also, *Marsden v. Overbury*, 18 C. B. 34; S. C., 36 Law & Eq. 276.

i. Proceeding ex parte. If after the service of notice of the hearing before the referee the plaintiff fails to appear, the referee may proceed *ex parte* to dismiss the complaint. The referee should report according to the fact, and the defendant may thereupon perfect his judgment. Rule 39, Sup. Ct. See *Williams v. Sage*, 1 Code R. N. S. 358; *Stephens v. Strong*, 8 How. 339; *Sage v. Mosher*, 17 id. 367; *Salter v. Malcolm*, 1 Duer, 596. So if the defendant fails to appear, the plaintiff may proceed to trial, and obtain a report in his favor, upon which he may enter judgment in the same manner as if the action had been tried by the court.

j. Mode of examination or trial. The Code declares that the trial by referees shall be conducted in the same manner and on similar notice as a trial by the court. They have the same power to grant adjournments, and to allow amendments to any pleadings and to the summons, as the court upon such trial, upon the same terms and with like effect. They have the same power to preserve order and to punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment, and to punish them as for a contempt for non-attendance, or for a refusal to be sworn, or to testify, as is possessed by the court. Code, § 272.

This section of the Code confers upon the referee complete jurisdiction over the cause, and for the purposes of a trial places him in the position of a judge at special term. The mode of conducting the trial, therefore, must be within the discretion of the referee, so far as relates to all questions within the ordinary discretion of a judge on the trial of a cause. No exception lies to the decision of a referee as to the mode of proceeding where all the issues are referred. *Palmer v. Palmer*, 13 How. 363; *Pratt v. Stiles*, 17 id. 211; S. C., 9 Abb. 150.

The preliminaries of the reference being arranged, the referee proceeds to call the cause and swear the witnesses. The witnesses are examined orally and their answers reduced to writing by the referee. He is, of course, governed by the legal rules of evidence, and cannot receive parol proof where the same facts may be established by a written instrument, which is proved to be in existence, and is neither produced nor its non-production

accounted for. *Hatch v. Pryor*, 3 Keyes, 441; S. C., 3 Trans. App. 317; *Every v. Merwin*, 6 Cow. 360. But the mere order in which proof shall be received rests in the discretion of the referee. *Gibson v. Pearsall*, 1 E. D. Smith, 90. So it is within his discretion to allow leading questions to be put to the witness, or otherwise (*Beach v. Raymond*, 2 E. D. Smith, 496); or to permit a witness to be recalled at the close of the case (*Pearson v. Fiske*, 2 Hilt. 146; S. C., 7 Abb. 419); or to hear further testimony after the case is closed. *Trimble v. Stilwell*, 4 E. D. Smith, 512; *Duguid v. Ogilvie*, 3 id. 527; S. C., 1 Abb. 145; *Ayrault v. Sackett*, 17 How. 461; S. C., 9 Abb. 154, note. As to Discretion, see *ante*, 210, 211.

A referee may also take testimony subject to objection, reserving the question as to its admissibility until the close of the trial, or even until his final decision, stating in his report whether such testimony has been received or excluded. But if the party objecting to the admissibility of the evidence insists that the referee shall decide as to its admissibility at the time, the referee should not receive such evidence and reserve to himself the power of retaining or rejecting it at the conclusion of the case. *Smith v. Kobbe*, 59 Barb. 289; *Peck v. Yorks*, 47 id. 131; *Clussman v. Merkel*, 3 Bosw. 402; *Brooks v. Christopher*, 5 Duer, 216; *McKnight v. Dunlop*, 5 N. Y. (1 Seld.) 537. But where a referee has received competent evidence subject to exception and to future decision as to its admissibility, an exception to this conditional admission will become unavailable, in case the final decision is in favor of retaining the evidence. *Bihin v. Bihin*, 17 Abb. 19. Although the practice of receiving evidence subject to objection prevails in some parts of the State, in trials before referees, it has never been expressly sanctioned by the courts, but has on the contrary been severely criticised and condemned by the court of appeals. *Sharpe v. Freeman*, 45 N. Y. (6 Hand) 802. It is clear that this practice is more honored in the breach than in the observance. See *Meyers v. Betts*, 5 Denio, 81; *Allen v. Way*, 7 Barb. 585; S. C., 3 Code R. 243.

The mode of examination here discussed relates to a reference to hear and determine the whole issues. Where the reference is made to a referee simply to take and state an account, the referee is a mere substitute for a master in chancery, and must conform in his proceedings to the old chancery practice. *Palmer v. Palmer*, 13 How. 363; *Cameron v. Freeman*, 18 id. 310; *Ket-*

chum v. Clark, 22 Barb. 319; *Elmore v. Thomas*, 7 Abb. 70. See Interlocutory Decrees or Orders, etc.

Under that practice all parties accounting before a master were required to bring in their accounts in the form of debtor and creditor, and if any of the parties were not satisfied with the accounts so brought in, they could proceed to examine the accounting party *upon interrogatories*, under the direction of the master. Rule 107, Court of Chancery.

This practice must still be followed in such actions. *Wiggin v. Gans*, 4 Sandf. 646.

Where the reference is to report upon any specific question of fact involved in the issue, the referee is bound by the same rules in regard to the admission or rejection of testimony that are applicable to trials in other cases; and, in general, the mode of examination is similar in all respects to the mode of examination on a reference to hear and determine the whole issues.

In references other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases, the testimony of the witnesses must be signed by them at the conclusion of their examination, to be filed with the report of the referee. Rule 39, Sup. Ct.

k. Contempts. The Code declares that referees shall have the same power to preserve order upon the trial and to punish all violation thereof, and to compel the attendance of witnesses before them by attachment, and to punish them as for a contempt for non-attendance, or refusal to be sworn or testify as is possessed by the court. Code, § 272.

The power to punish for contempt was no doubt intended to be confined to cases in which the referee acts as a substitute for the court to hear and determine the entire issues in a cause. *Burnett v. Phalon*, 11 Abb. 157; S. C., 19 How. 530.

On the trial of such issues, the referee has an undoubted authority to adjudge that a witness examined before him is in contempt for refusing to testify, or to produce papers or documents, when required to do so by a *subpœna duces tecum*. *Heerdt v. Wetmore*, 2 Rob. 697. This power to punish for a contempt of court committed in the presence of a referee is not vested by the statute exclusively in the referee. The court retains its inherent original power, concurrent with the referee, to punish for a contempt of court in a matter pending before a referee appointed by it. *Burnett v. Phalon*, 11 Abb. 157; S. C., 19

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Contempts—Form of attachment against witness for non-attendance before referee.

How. 530 ; *Seeley v. Jobson*, 6 Abb. 217, note ; *Byas v. Smith*, 4 Bosw. 679. But there are cases in which the referee should act promptly in vindicating the dignity of his court. Thus, where a counsel repeatedly interrupts the orderly proceedings on the trial by instructing a witness not to answer questions, it is the duty of the referee, then and there, to adjudge the counsel to be guilty of disorderly and contemptuous behaviour committed during the sitting before such referee, in his immediate view and presence, and directly tending to interrupt the proceedings, or to impair the respect due his authority, and to issue an attachment and commit him. *Heerdt v. Wetmore*, 2 Rob. 697.

In the case last cited it was held that the authority to punish for such misconduct pertains, solely and exclusively, to the court in which it occurs, in its immediate view and presence ; and that the power to punish therefor could no more be delegated to a judge of the superior court than it could be legally assumed by a judge of some other tribunal. See *Seeley v. Jobson*, 6 Abb. 217, note.

But where the referee declines to take upon himself the responsibility of committing a party for a contempt, he should first pass upon the question, even if he reports his facts, conclusions, etc., to the court, in order that the attachment may issue from it. *Heerdt v. Wetmore*, 2 Rob. 697 ; *Burnett v. Phalon*, 19 How. 530 ; S. C., 11 Abb. 157 ; *Fobes v. Meeker*, 3 Edw. Ch. 452 ; *Fraser v. Phelps*, 4 Sandf. 682.

In regard to the proceedings to punish for contempts, see Contempts. See, also, *Pitt v. Davison*, 37 N. Y. (10 Tiff.) 235 ; S. C., 34 How. 355 ; 3 Abb. N. S. 398 ; 4 Trans. App. 266 ; *King v. West*, 10 How. 333, 335.

Form of attachment against witness for non-attendance before referee.

The People of the State of New York to the Sheriff of
greeting :

We command you to attach A. B., and forthwith (or, on the day of instant, at o'clock in the noon) bring him before me, the undersigned referee, at my office, No. , street, in the (city) of , to answer for his misconduct in not obeying a writ of subpoena to him directed, and on him duly served, commanding him to appear before me, the said referee, at the place aforesaid, and give evidence in a certain action pending between C. D., plaintiff, and E. F., defend-

Affidavit of service of subpoena — Opening case.

ant, on the part of the , and have you then and there this writ.

Witness, G. H., referee aforesaid, at the city of , the day of , one thousand eight hundred and

G. H.,
Referee.

O. K.,
Attorney.

Where this writ issues to compel the attendance of a witness, a foundation must be first laid therefor by proof that the party has been duly subpoenaed. This may be done by an affidavit in the following form:

Affidavit of service of subpoena.

(Title of cause.)

(Venue.)

A. B., being sworn, says that the witness hereafter named resides at the place where he was subpoenaed by deponent, as hereafter stated. That deponent did, at the time and place below set forth, serve the annexed subpoena upon the witness named therein, by showing said subpoena to such witness, and delivering to him a subpoena ticket, containing the substance thereof and paying to him the sum set opposite his name, viz.:

On C. D., at , N. Y., amount paid, dollars, as and for traveling fees for such witness from the residence of , said witness, to the place mentioned in the subpoena, and one day's attendance as such witness.

Sworn and subscribed before me, }
this day of , 187 . }

A. B.

1. *Opening case.* It is a matter of sound discretion with a referee to open a cause, after it has been submitted to him, for the purpose of hearing further testimony; and it is presumed that he will discreetly exercise such discretion. *Cleveland v. Hunter*, 1 Wend. 104. Thus, in the exercise of this discretion, the referee may, even upon his own motion, open a case for further testimony, although several days have elapsed since the evidence was closed and since the cause was summed up and submitted to his decision. *Duguid v. Ogilvie*, 3 E. D. Smith, 527; S. C., 1 Abb. 145; *Packet v. French*, Hill & Denio, 103; *Putnam v. Crombie*, 34 Barb. 232; *Ayrault v. Sackett*, 17 How. 461; S. C., 9 Abb. 154, note; affirmed, 17 How. 507.

He may open the case also on the application of either party; but the referee should be careful not to expose himself to such applications from either side, by advising either party in respect

to his decision in advance of the delivery of his report. Should this discretionary power be abused, the court would apply a remedy after the report has been made, on the fact of such abuse being shown. *Ayrault v. Sackett*, 17 How. 461; S. C., 9 Abb. 154, note.

But, if the referee decides not to receive further proof, after the case has been closed by consent of parties, and the supreme court does not deem that the party offering such proof has made out a case requiring them to give relief, there is no further remedy. The receiving of further proof is not a matter of strict right, and the court of appeals will not review the exercise of a discretion by the original tribunal. *Williams v. Hayes*, 20 N. Y. (6 Smith) 58.

m. Fixing time of hearing. Upon the receipt of a certified copy of the order of reference, the referee should proceed to fix the time for the hearing. The appointment of the time may be either by written notice or by parol. *Stephens v. Strong*, 8 How. 339. As the trial must be upon the same notice as a trial by the court, the time fixed for the hearing should not be less than fourteen days from the time of the service of the order of reference, unless the parties stipulate for a shorter time. See Code, § 272. Although it is not necessary that the referee should fix the time and place of the hearing in writing, it is the better practice to do so, in order that a copy of the appointment may be served with the notice of trial. *Stephens v. Strong*, 8 How. 339; *Sage v. Mosher*, 17 id. 367.

n. Granting adjournments. A referee has the same power to grant adjournments as the court upon the trial, and upon the same terms and with like effect. Code, § 272. See *ante*, 64 to 77.

In the exercise of this power, referees are required to exercise a reasonable discretion; and if a referee unreasonably refuses an adjournment at the request of either party, his report will be set aside on the motion of the party aggrieved thereby. *Forbes v. Frary*, 2 Johns. Cas. 224.

The Revised Statutes provide that referees shall appoint a time and place for the hearing, and shall adjourn the same from time to time, as may be necessary; and, on the application of either party, and for good cause, they may postpone such hearing to a time not extending beyond the next term of the court in which the case is pending. 2 R. S. 384 (399), § 43. The proceeding requires that they shall proceed with diligence to hear and determine the matter in controversy. *Id.*, § 42.

Granting adjournments — Referee as a witness.

Under the foregoing provisions of the Revised Statutes, referees may, in proper cases, adjourn for a reasonable time on their own motion, and without the consent of the parties, or either of them. The only limitation in the statute in relation to such adjournments is, that they shall be such as may be necessary, and of that necessity the referees must be the judges. *Ex parte Rutter*, 3 Hill, 464; S. C., 1 N. Y. Leg. Obs. 178.

This power of granting adjournments, as it existed under the Revised Statutes, is still preserved by the Code. See Code, §§ 272, 421. But the power is not limited as to time, as in section 43 of the Revised Statutes.

The courts will not, however, permit a referee to act oppressively and delay the parties for an unreasonable time, but will vacate so much of the order of reference as designates the referee, and will appoint another, with directions to proceed in the reference. *Forrest v. Forrest*, 3 Bosw. 661; *Ex parte Rutter*, 3 Hill, 464; S. C., 1 N. Y. Leg. Obs. 178.

Sickness, family afflictions, or the calls of urgent business, are sufficient excuses to authorize a referee to adjourn a cause on his own motion. *Ex parte Rutter*, 3 Hill, 464; S. C., 1 N. Y. Leg. Obs. 178. But the intention of one of the counsel to visit Europe, either on business or for pleasure, is not a sufficient ground for an adjournment. *Forrest v. Forrest*, 3 Bosw. 661. The absence of material witnesses is, however, a good ground for granting an adjournment. *Forbes v. Frary*, 2 Johns. Cas. 234; *Bird v. Sands*, 1 id. 394; S. C., Coleman & Caines' Cas. 107; *Sudam v. Swart*, 20 Johns. 476.

In all cases the application for an adjournment must be made to the referee, and not to the court appointing him. *Langley v. Hickman*, 1 Sandf. 681.

In making adjournments, the referee should, of course, follow the settled practice of the courts in similar cases, and observe all due formality. But when both parties have given all the testimony they desire before the referee, and have submitted the cause to be decided by him on such testimony, the fact that adjournments were not formally made from day to day, or from the time of one hearing to another, is in itself of no consequence, and will not invalidate the proceedings. *Accessory Transit Co. v. Garrison*, 9 Abb. 141; S. C., 18 How. 1.

o. Referee as a witness. In no case can a referee be sworn as a witness in a cause referred to him, nor can one of several

Refusing to hear evidence.

referees be so sworn. This rule is founded on the ground that the referee acts as a judge, and would be compelled to pass upon his own competency, and the relevancy of the testimony he might give. To allow a judge to be sworn as a witness in a cause tried before him, would be contrary to public policy, and as the referee acts as both judge and jury in the trial of a cause, this objection applies with double force to him. *Morss v. Morss*, 11 Barb. 510; S. C., 1 Code R. N. S. 374; 10 N. Y. Leg. Obs. 151.

p. Refusing to hear evidence. Where several witnesses have been sworn and examined on both sides, touching the character for truth of a witness previously examined, the referee has a right to interpose and refuse to hear further evidence, either against or in support of the character of the witness. *Green v. Brown*, 3 Barb. 119. See *Nolton v. Moses*, id. 31. So where the trial of a cause involves a question on which the opinions of witnesses are competent testimony, the referee may limit the number of witnesses to be examined upon each side as to matters of opinion. *Sizer v. Burt*, 4 Denio, 426. So where a large number of witnesses have been examined for the purpose of substantiating a single fact, the referee may refuse to hear the testimony of other witnesses called to testify to the same fact. *Anthony v. Smith*, 4 Bosw. 503. But while a referee may exercise his discretion in controlling the number of witnesses to be examined to a single point to prevent a useless waste of time, he cannot, in the exercise of such discretion, refuse to hear further testimony, where one witness has been examined on each side, as to some particular point of inquiry, and the evidence so given has been contradictory. *Ward v. The Washington Ins. Co.*, 6 Bosw. 229. See *Eakin v. Brown*, 1 E. D. Smith, 36. And where the right to recover depends upon the proof of a certain fact, the party offering testimony upon that point should not be limited as to the number of witnesses to be examined in relation thereto. *Ante*, 126, 211; *Hubble v. Osborn*, 31 Ind. 249. See 2 Wait's Law & Pr. 607.

After a trial has been commenced before a referee, and a portion of the evidence taken, the fact that the cause was adjourned to allow the plaintiff to obtain leave of court to reply to a counter-claim, will not render it necessary for the referee to commence the trial *de novo*, upon the adjourned day; and the referee may properly refuse to again hear evidence taken upon the trial

Requiring the production of books, etc. — Granting allowances.

prior to the adjournment. *White v. Smith*, 46 N. Y. (1 Sick.) 418. See *Union Bank v. Mott*, 19 How. 267; S. C., 11 Abb. 42.

q. Requiring the production of books, etc. A referee to whom all the issues in an action have been referred has no power to order the production of books or papers by either party where there is no provision to that effect in the order of reference.

This power is limited to the court or a justice thereof, whether exercised under the Code or under the Revised Statutes. *Frazer v. Phelps*, 3 Sandf. 741; S. C., 1 Code R. N. S. 214. The power of the court to confer upon a referee authority to require the production of books and papers exists only in equitable actions, and has never been exercised or claimed by courts of law. *North v. Platt*, 7 Rob. 207. See vol. 2, pp. 540, 553.

Where a reference is ordered in an action of account, the statute gives to the referee power to examine the parties on oath, and to require the production of all books of accounts, papers and documents, in the custody or under the control of either party. 2 R. S. 385 (400), § 50.

On a reference of this nature, a referee's certificate that the production of books and papers is necessary, will be presumptively sufficient on a motion to a justice at chambers to warrant an order for their production. *Frazer v. Phelps*, 3 Sandf. 741; S. C., 1 Code R. N. S. 214.

Under the provisions of section 272 of the Code it is clear that a referee has power to punish as for a contempt the refusal of a witness or a party to produce books or papers when properly *subpoenaed* for that purpose. All decisions to the contrary have been rendered obsolete by the amendment of that section. See *Heerd v. Wetmore*, 2 Rob. 697; *Bonesteel v. Lynde*, 8 How. 228.

r. Granting allowances. A referee to whom a judgment or order is referred, with a view to his taking accounts between the parties, or by a single party, has power to grant all just allowances. This power should, however, be expressly conferred by the judgment or decree.

The question of granting allowances will be found fully discussed elsewhere.

s. Costs. In equitable actions, where costs are in all cases discretionary, a referee, to whom the whole cause has been referred, may, and should pass upon the question of costs; and his decision thereon is conclusive, except perhaps in case of a

Costs — Altering report.

manifest abuse of authority. *Stephens v. Veriane*, 2 Lans. 90; *Pratt v. Stiles*, 17 How. 211; S. C., 9 Abb. 150; *Barker v. White*, 3 Trans. App. 86; S. C., 3 Keyes, 495; 5 Abb. N. S. 124; *Ludington v. Taft*, 10 Barb. 447; *Graves v. Blanchard*, 4 How. 300; S. C., 3 Code R. 25; *Mersereau v. Ryerss*, 12 How. 300.

But where costs are not discretionary, but the right thereto is determined by law, the referee has no power to award costs to either party. A referee has nothing to do with the question of costs in an action on a money demand on contract. *Tilman v. Keane*, 1 Abb. N. S. 23; *Fuller v. Conde*, 47 N. Y. (2 Sick.) 89. Thus, in an action upon contract tried by a referee, where the recovery is less than \$50, the question whether or not the action was one of which a justice of the peace had jurisdiction, must be determined by the facts found by the referee, and upon those facts the law determines the question of costs; and the referee has no power over, and can give no judgment upon, the question of costs. *Fuller v. Conde*, 47 N. Y. (2 Sick.) 89. See *Gilliland v. Campbell*, 18 How. 177.

So in actions prosecuted or defended by an executor or administrator, a referee to whom the whole issue or cause is referred, has not the right to decide the question of costs, or power to award costs against the executor or administrator personally, or against the estate he represents. The power to grant costs against executors and administrators in actions under the Code, rests with the court. *Mersereau v. Ryerss*, 12 How. 300; *Howe v. Lloyd*, 9 Abb. N. S. 257; S. C., 2 Lans. 335.

A referee has no power to grant an extra allowance of costs under the provisions of section 309 of the Code. *Sackett v. Ball*, 4 How. 71; S. C., 2 Code R. 47; *Osborne v. Betts*, 8 How. 31; *Howe v. Muir*, 4 id. 252; S. C., 3 Code R. 21; *Mann v. Tyler*, 6 How. 235; S. C., 1 Code R. N. S. 382. This power being given to the court only cannot be delegated. *People v. Albany & Susquehanna R. R. Co.*, 5 Lans. 25.

t. Altering report. The power of a referee to change or alter his report ceases upon his signing it and announcing that fact to the successful party. However omissive it may be the referee can make no changes in the report, as such, after the performance of that act. The power given by rule 41 of the supreme court to insert further findings in the case at the request of either party does not affect the principle here stated. The court which authorized him to act in the first instance may, however, grant

Administering oaths.

him authority to correct his report. But even after a referee has come to a conclusion after due deliberation upon a cause submitted to him, has written his opinion, and announced his decision to the parties, he has not lost authority and control over the case, so long as he has not drawn up and signed a formal report thereon; and he may reconsider his decision and change it or may withhold his report for the purpose of receiving further evidence. It is the signing of the report, together with the notice of the fact to the party entitled to it, that precludes his opening of the case for further consideration and closes his judicial authority therein. *Ayrault v. Sackett*, 17 How. 507; S. C., 9 Abb. 154 note; *Gray v. Fisk*, 12 Abb. N. S. 213; S. C., 42 How. 135; *Litch v. Brotherson*, 25 id. 407; S. C., 16 Abb. 384; *Shearman v. Justice*, 22 How. 241; *Kissam v. Hamilton*, 20 id. 369.

u. Administering oaths. The Code provides that every referee appointed pursuant to that act shall have power to administer oaths, in any proceeding before him, and shall have generally the powers now vested in a referee by law. Code, § 421. If more than one referee is appointed, any one of them may administer the necessary oath to witnesses produced before them for examination. 2 R. S. 384 (399), § 46. But though the oath is in form administered by one of the referees, it is in truth the act of all, and it can only be done by the authority and in the presence of them all. In this respect one acts as the clerk of the board, just as the clerk of a court of record administers an oath at the circuit, by the authority and in the presence of the court. The former is the act of the board of referees, and the latter of the court. The former would be invalid in the absence of the other referees, as the latter would be in the absence of the judge. *Morss v. Morss*, 11 Barb. 510; S. C., 1 Code R. N. S. 374; 10 N. Y. Leg. Obs. 151.

In all cases the power of a referee to administer a judicial oath is derived only from the order of the court appointing him, and unless the decision of the court, that the cause be referred to the referee, is incorporated in an order and entered in the minutes, any oath administered by such referee will be extra-judicial, and will be insufficient to sustain a charge of perjury against a witness to whom it was administered. *Bonner v. McPhail*, 31 Barb. 106.

But a referee, duly appointed, not only has power, but it is his duty to administer the oath to witnesses, and he can receive no

evidence from witnesses not sworn by him, except, of course, where the deposition of a witness is taken on commission, or conditionally, etc. Thus, upon a reference to take the usual proofs and compute the amount due in an action of foreclosure, the referee cannot receive on the computation an affidavit sworn to before a commissioner of deeds. *Security Fire Ins Co. v. Martin*, 15 Abb. 479.

v. Control of court over referee. It has been held by the superior court, at general term, that referees are no longer officers of, or under the control of, the court; that they become, by appointment, an independent tribunal, having such powers as are given by statute; that it was the plain intention of the legislature that this tribunal should possess all the powers and exercise all the functions of a court, independently and without accountability to any other tribunal, and that its decisions should be subject to review only on appeal. *Woodruff v. Dickie*, 31 How. 164; S. C., 5 Rob. 619. See *Heerdt v. Wetmore*, 2 id. 697.

The power of a referee, on the trial of a cause, to act in all respects as an independent tribunal, has been too broadly stated in the foregoing opinion.

A referee, appointed to hear and determine a cause, is always under the control and direction of the court, and may be removed at its pleasure; and where a referee has exceeded his authority in making an order during the progress of a cause, such order may be set aside by the special term; and he may be compelled to proceed to the trial of the issues referred to him for determination. *Ford v. Ford*, 35 How. 321; S. C., 53 Barb. 525; *Union Bank v. Mott*, 18 How. 506; S. C., 10 Abb. 372. See *Barton v. Herman*, 3 Daly, 320; S. C., 8 Abb. N. S. 399.

As a general rule the courts will decline to interfere with their referees, while a reference is pending, in respect to errors which can be considered and corrected on appeal, or on motion to set aside the report. *Schermerhorn v. Develin*, 1 Code R. 28; *Langley v. Hickman*, 1 Sandf. 681. The courts refuse to act in such cases as a matter of expediency, and not from want of power.

v. Discretion. Where the Code has conferred discretionary powers upon a referee, the exercise of that discretion is not subject to review by the appellate court. Thus, where it is within the discretion of a referee to allow an amendment to the pleadings, his decision, granting or denying the amendment, cannot be reviewed. *Melvin v. Wood*, 3 Keyes, 533; S. C., 3 Trans. App.

Trial by referee, how conducted — Bringing on the hearing.

297; 4 Abb. N. S. 438; *Woodruff v. Hurson*, 32 Barb. 557. So the mode of conducting the trial is within the discretion of the referee, so far as relates to all questions within the ordinary discretion of a judge on the trial of a cause; and no exception lies to the decision of the referee so far as relates to the mode of proceeding. *Palmer v. Palmer*, 13 How. 363. Thus, the refusal of an adjournment is a matter of discretion, and not reviewable (*Cooley v. Huntington*, 16 Abb. 384); and the same rule applies to his decision as to the order of admitting proof (*Gibson v. Pearsall*, 1 E. D. Smith, 90); the privilege of a counsel to ask leading questions (*Cheaney v. Arnold*, 18 Barb. 434); the recalling of witnesses (*Pearson v. Fiske*, 2 Hilt. 146); or the opening of a cause for the purpose of hearing further testimony. *Ayrault v. Sackett*, 17 How. 507; S. C., 9 Abb. 154, note; *Kissam v. Hamilton*, 20 How. 369; *Cleaveland v. Hunter*, 1 Wend. 104; *Trimble v. Stilwell*, 4 E. D. Smith, 512.

Section 2. Trial by referees, how conducted.

a. Bringing on the hearing. Where a cause is referred for the purpose of a trial, either party may proceed to bring on the hearing. *Thompson v. Krider*, 8 How. 248; *Williams v. Sage*, 1 Code R. N. S. 358.

But when the reference is merely interlocutory, the party obtaining the order has the right, in the first instance, to bring on the hearing. Under the old chancery practice, if the party entitled to bring on the hearing neglected to do so, any other party or person interested in the subject-matter of the reference was at liberty to apply to the court to have the prosecution of the reference committed to him. This application could only be made upon the default of the party entitled to move, and default did not occur until thirty days after the entry of the order directing the reference. See *Quackenbush v. Leonard*, 10 Paige, 131; *Holley v. Glover*, 9 id. 9. It is presumed that the chancery practice must still be followed, although the practice of allowing either party to bring on the hearing is much more simple and seems unobjectionable.

b. Appointment of hearing. The order of reference having been duly made and entered, the party entitled to bring on the hearing should serve upon the referee a certified copy of the order. See *Bonner v. McPhail*, 31 Barb. 106. The referee being thus duly commissioned to try the cause, should appoint a time and place for the hearing. 2 R. S. 384 (399), § 43. This appoint-

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Appointment of hearing.

ment may be oral or in writing, though a written appointment is preferable. *Sage v. Mosher*, 17 How. 367; *Stephens v. Strong*, 8 id. 339. If the appointment is in writing, a copy thereof should be served on the adverse party, either with or before the notice of trial. *Ib.*

These formalities being disposed of, the parties should then prepare for trial. As on trials by the court or jury, the parties should be prepared with their evidence, and should see that all necessary witnesses are subpoenaed in advance of the trial, as an adjournment of the hearing, for the purpose of procuring the attendance of witnesses, may be granted only upon the condition that the moving party pay a trial fee and the costs of procuring the attendance of the witnesses, etc., of the adverse party. See *Union Bank v. Mott*, 19 How. 267; S. C., 11 Abb. 42. If some of the witnesses of either party are non-residents of the State, the party desiring their testimony upon the trial should take the proper steps to procure the taking of their deposition on a commission; and if there is not sufficient time to have their testimony so taken before the day appointed for the hearing, a stay of proceedings should be procured with the order for the commission.

So where any of the witnesses are about to leave the State, or are so sick or infirm as to afford reasonable grounds for apprehension that they will not be able to attend the trial before the referee, an application should be made to have the testimony of such witness or witnesses taken conditionally.

If documentary evidence will be required on the trial, and the documents are not in the possession of the party desiring to introduce them in evidence, a *subpoena duces tecum* should be procured and served upon the party having such documents in his possession.

So if a party has in his possession, or under his control, any paper which is material to the action and which he proposes to introduce in evidence upon the trial, he should exhibit it to the adverse party, or his attorney, and request an admission in writing of its genuineness.

So if either party desires a copy or an inspection of books, papers and documents in the possession or under the control of the adverse party, an order should be procured directing such party to produce such papers and grant an inspection.

Place of hearing — Notice of hearing.

c. Place of hearing. Where a reference is ordered by a court of limited jurisdiction, the referee must appoint the hearing at some place within the jurisdiction of the court directing the reference. *Bonner v. McPhail*, 31 Barb. 106.

But where a reference of a cause is ordered by a court of general jurisdiction, the referee may appoint the hearing in any part of the State, provided the action is not local in its nature, or the parties assent to the change of venue. *Newland v. West*, 2 Johns. 188. The place of meeting need not coincide with the place of trial mentioned in the complaint. *Ib.*; *Pierce v. Voorhees*, 3 How. 111.

But the mere fact that a reference of a cause triable in one county is made to a referee residing in another county will not of itself operate as a change of venue, nor can the parties by meeting in the latter county from time to time, without objection, be deemed to have assented to a change of venue for all purposes of the action. If the cause of action is local in its nature, and the place of trial has not been changed by order of the court, the right to proceed with the reference in any county other than that in which the venue is laid in the complaint, can be derived only from the consent of parties. *Wheeler v. Maitland*, 12 How. 35. And where an action local in its nature, as, for instance, an action of foreclosure, is being tried, with the assent of the parties in a county other than that designated in the pleadings, the fact that it is being so tried will not estop a party from objecting to any other proceeding being had in a county other than that designated in the complaint. *Ib.*

Where a reference is ordered on failure to answer, the reference must be executed in the county in which the action is triable, unless the court shall otherwise order. Rule 33 of Sup. Ct.; *Brush v. Mullany*, 12 Abb. 344.

d. Notice of hearing. The same notice of trial is required where the hearing is before the referee, as where the trial is before a court or jury. Code, § 272; *Wetter v. Schlieper*, 7 Abb. 92. The notice must, therefore, be given at least fourteen days before the hearing. Code, §§ 256, 272.

An appearance and participation in the proceedings before a referee will, however, waive all objection to the insufficiency of the notice given. *Wetter v. Schlieper*, 7 Abb. 92.

Either party may notice the cause for trial. *Thompson v. Krider*, 8 How. 248; *Williams v. Sage*, 1 Code R. N. S. 358.

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Notice of hearing before referee — Referees to be sworn.

Notice of hearing before referee.

(*Title of cause.*)

SIR: The above cause will be brought to trial before
the referee therein, at _____, on the _____ day of _____, 187____,
at _____ o'clock in the _____ noon.

Dated the _____ day of _____, 187____.

Yours, etc.,

A. B.,

Attorney for _____.

To C. D., Attorney for _____.

Admission of service of notice.

Due service of above (or *within*) notice is hereby admitted
the _____ day of _____, 187____.

E. F.,

Attorney for _____.

e. Referees must all be present. If more than one referee is appointed to try a cause all must be present before any business can be legally transacted. 2 R. S. 384 (399), §§ 44, 46; *M Inroy v. Benedict*, 11 Johns. 402; *Bulson v. Lohnes*, 29 N. Y. (2 Tiff.) 291; *Harris v. Norton*, 7 Wend. 534; *Jackson v. Ives*, 22 id. 637; *Morss v. Morss*, 11 Barb. 510; S. C., 1 Code R. N. S. 374; 10 N. Y. Leg. Obs. 151; *Townsend v. Glens Falls Ins. Co.*, 10 Abb. N. S. 277.

f. Referees to be sworn. Before proceeding to hear any testimony in the cause, the referees must be severally sworn faithfully and fairly to hear and examine the cause, and to make a just and true report according to the best of their understanding. This oath may be administered by any person authorized to take affidavits to be read in the court in which the suit is pending, or by any justice of the peace. 2 R. S. 384 (399), § 44.

Although the statute is thus explicit in requiring a referee to be sworn, before entering upon his duty, yet it often happens that no such oath is taken. If the parties nevertheless proceed with the reference without objection, they will be held to have waived their right to object. *Keator v. Ulster & Delaware Plank Road Co.*, 7 How. 41. See, also, *People v. Connor*, 46 Barb. 333.

g. General course on hearing. A trial by a referee or referees is conducted in all respects in the same manner as a trial by the court. Code, § 272. The party having the right to begin in a trial by the court would have the same right before the referee. The

trial is to be had before him, as before one of the judges of the court; and for the purposes of the trial and its disposition he has the ordinary powers of the court. The mode of conducting the trial, therefore, is within his discretion, so far as relates to all questions within the ordinary discretion of a judge on the trial of a cause. *Palmer v. Palmer*, 13 How. 363. He may determine the order of admitting proof, determine the number of witnesses to be examined on a point in certain cases, decide whether leading questions shall be put, and also whether a witness shall be recalled and re-examined after he has left the stand. See art. 2, *ante*, 272, 274, 279, 280.

Witnesses are sworn by the referee before being examined as upon a trial by the court. The following oath may be administered. "You do solemnly swear (or affirm) that you will true answers make to such questions as shall be put to you touching the matters in reference in a certain cause depending in the (supreme court) of the State of New York, wherein A. B. is plaintiff and C. D. and others are defendants, and therein will speak the truth, the whole truth, and nothing but the truth, so help you God." 1 Van Santy. Pr. 531. Or the oath may be in the following form: "You do solemnly swear (or affirm) that the evidence you shall give in the cause now pending in the supreme court in the State of New York, wherein A. B. is plaintiff and C. D. is defendant, shall be the truth, the whole truth, and nothing but the truth, so help you God." The oath must be administered by the referee in person. See *Security Fire Ins. Co. v. Martin*, 15 Abb. 479. The witness being sworn, is first examined by the party calling him and is then cross-examined by the opposite party. The referee may also put such questions to the witness as he deems proper. The referee takes down the answers of the witness as they are given, but not the questions to which they are responsive. If any question is raised as to the admissibility of evidence, the referee should pass upon it at once and not receive the evidence subject to exception. *Sharpe v. Freeman*, 45 N. Y. (6 Hand) 802.

The referee may undoubtedly employ a clerk to perform the mere mechanical duty of writing down the evidence; but this will not render it less necessary for the referee to be present at the same time. It is the duty of the referee to be always present during the examination of witnesses, as it is at all other times during the progress of the trial; and the court will set aside his

report if he absents himself at such time against the will, and under the objection of either party. *Metcalf v. Baker*, 11 Abb. N. S. 431. But the objection must be taken at the time; and if the objection is not so taken, and the parties go on with the examination of witnesses and finally submit all the evidence to the referee for his decision, they will be deemed to have waived the right to object afterward. *Ib.* But the referee can recover fees only for the time actually spent upon the reference, and cannot recover either as fees or disbursements for the services of others rendered for him during his absence. *Schultz v. Whitney*, 17 How. 471; S. C., 9 Abb. 71.

Should the witness refuse to testify in relation to any point material to the issue, the referee should at once commit him for contempt, and if the refusal to testify is due to the advice of counsel given on the trial, the counsel should also be committed for contempt. *Heerdt v. Wetmore*, 2 Rob. 697; Code, § 272.

The right of the referee to grant adjournments and to allow amendments has been discussed elsewhere.

h. Defaults. If either party fails to appeal at the hearing, after due notice, the referee may, in his absence, proceed upon the motion of the party giving the notice. *Stephens v. Strong*, 8 How. 339; *M'Inroy v. Benedict*, 11 Johns. 402; *Sage v. Mosher*, 17 How. 367; *Williams v. Sage*, 1 Code R. N. S. 358.

i. Postponement. A referee may, in his discretion, postpone a hearing for good cause shown upon such terms as are usually imposed by courts upon putting off trials. 2 R. S. 384, § 43; *Sickles v. Fort*, 12 Wend. 199; *Van Rensselaer v. Fay*, 18 Wend. 509; *Butler v. Bates*, 5 Hill. 375. Section 314 of the Code provides, that when an application shall be made to a court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding \$10, besides the fees of witnesses, may be imposed as the conditions of granting the postponement. Code, § 314. Prior to the Code, the referee had no power to compel the payment of any costs imposed by him as a condition of granting a postponement or adjournment, and the only remedy of the opposite party, in case of a failure to pay the costs imposed, was to proceed at once to a hearing. *Butler v. Bates*, 5 Hill, 375. But as the Code gives to the referee the same power to grant adjournments as the court, upon the same terms and with like effect, it follows, that when a party obtains the postponement of a trial on payment of costs, the adverse party may, on the omission of

the former to pay them, insist on having the trial proceed, or he may waive that right, and the referee, on motion, will compel payment. See *Gamble v. Taylor*, 43 How. 375; *Bulkeley v. Keteltas*, 2 Sandf. 735.

The court will not allow the referee to postpone an action indefinitely or for an unreasonable time, but will either require the referee to proceed to a hearing, or will vacate so much of the order of reference as designates the referee. *Forrest v. Forrest*, 3 Bosw. 650.

j. Variance. It is not only within the discretion, but it is the duty of the referee to disregard all immaterial variances between the pleadings and the proof, which have not misled the parties. *Hart v. Hudson*, 6 Duer, 294; *Harmony v. Bingham*, 1 id. 209; S. C. affirmed, 12 N. Y. (2 Kern.) 99. It is only where the allegations of the cause of action are unproved, not in some particular or particulars only, but in their entire scope and meaning, that a referee can dismiss a complaint for failure of proof. Code, §§ 147, 171; *Poirer v. Fisher*, 8 Bosw. 258. If the plaintiff at the hearing prove the substance of the allegations of the cause of action, though he fail to prove some particular or particulars of it, the variance must be disregarded as immaterial, unless the defendant prove at the hearing, to the satisfaction of the referee, that the alleged variance has actually misled him, and in what respect. See Code, §§ 145, 169; *Catlin v. Gunter*, 11 N. Y. (1 Kern.) 368; *Poirer v. Fisher*, 8 Bosw. 258.

Where an answer has been interposed, the plaintiff is entitled to any relief to which the facts proved entitle him, provided such facts are embraced within the issue, and the relief to be granted is consistent with the case made by the complaint. The matters in a complaint which do not tend to show a right of action in the plaintiff may be disregarded as surplusage, if there are other facts which constitute a cause of action. See Code, §§ 231, 275; *Marquat v. Marquat*, 12 N. Y. (2 Kern.) 336; *Poirer v. Fisher*, 8 Bosw. 258.

k. Nonsuit. A referee has power to dismiss a complaint for not stating facts sufficient to constitute a cause of action. *Coffin v. Reynolds*, 5 Trans. App. 74; S. C., 37 N. Y. (10 Tiff.) 640. This power is expressly conferred by a rule of the supreme court, which provides, that on a hearing before referees, the plaintiff may submit to a nonsuit or dismissal of his complaint, or may be nonsuited or his complaint be dismissed in like manner as upon

a trial, at any time before the cause has been finally submitted to the referees for their decision, in which case the referees must report according to the fact, and judgment may thereupon be perfected by the defendant. Rule 39, Sup. Ct. See *Scofield v. Hernandez*, 47 N. Y. (2 Sick.) 313.

1. *What questions considered.* Where the entire issues of a cause are referred to a referee to hear and determine, he may take any accounts that may be necessary to the final determination of the action. In such cases, the referee possesses the power of the court to determine the liability of a party to account, and also the power of the former master in chancery to take the account. *Palmer v. Palmer*, 13 How. 363; *Pratt v. Stiles*, 9 Abb. 150; S. C., 17 How. 211. The referee may announce to the parties his decision upon the general issues before proceeding to take the account, if the liability to account depends upon such decision; but he should proceed to take the account before making any report. *Pratt v. Stiles*, 9 Abb. 150; S. C., 17 How. 211. In *Palmer v. Palmer*, above cited, it was intimated that the better practice, in such cases, required the referee to make a separate report upon the general issues and the liability to account, in order that an appeal might be taken from a judgment entered upon this report, and thus obtain the decision of the court upon the point before the account is taken. The expediency of following this practice may, however, be doubted. See *Pratt v. Stiles*, 9 Abb. 150; S. C., 17 How. 211; *McMahon v. Allen*, 27 Barb. 335; S. C., 7 Abb. 1; *Crosbie v. Leary*, 6 Bosw. 312; *Kapp v. Barthan*, 1 E. D. Smith, 622; *Bouton v. Bouton*, 42 How. 11.

Where the question of costs is in the discretion of the referee, he not only has the right, but it is his duty to decide it. *Ludington v. Taft*, 10 Barb. 447; *Pratt v. Stiles*, 17 How. 211; S. C., 9 Abb. 150; *Graves v. Blanchard*, 4 How. 300; S. C., 3 Code R. 25; *Gilliland v. Campbell*, 18 How. 177. But where the right to costs does not rest in the discretion of the court, but upon facts proved upon the trial, he has no right to consider or decide the question. *Mersereau v. Ryerss*, 12 How. 300. See *Howe v. Lloyd*, 9 Abb. N. S. 257; S. C., 2 Lans. 335; *Tilman v. Keane*, 1 Abb. N. S. 23; *Fuller v. Conde*, 47 N. Y. (2 Sick.) 89.

Section 3. Interlocutory references.

a. *In general.* As a general rule, the course of proceedings upon an interlocutory reference is the same as upon a reference of the whole issues to a referee to hear and decide. In some

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cases the old chancery practice must be followed, as it has been still retained by sections 271, 469 of the Code, and rule 97 of the supreme court. See *Palmer v. Palmer*, 13 How. 363; *Ketchum v. Clark*, 22 Barb. 319; *Elmore v. Thomas*, 7 Abb. 70. As a full discussion of interlocutory decrees and orders necessarily embraced the discussion of interlocutory references, it only remains in this connection to point out generally the matters peculiar to references of this nature as distinguished from those appertaining to references to hear and determine the entire issues.

b. Reference of specific questions of fact. There are two distinct classes of references authorized by the first subdivision of section 271 of the Code.

In the first class are included all references of an entire action where directions are given to the referee to hear and decide the whole issue. The report of a referee, on a reference of this nature, stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. Code, § 272.

The second class includes all references where the referee is directed to report specific questions of fact involved in the issues. Where the reference is to report the facts, the report of the referee has all the effect of a special verdict. *Ib.* The character and effect of the report of a referee on a specific question of fact being thus defined by the Code, it is easy to determine the nature of the powers and duty of the referee upon the reference.

The Code defines a special verdict as that by which the jury find the facts only, leaving the judgment to the court. Code, § 260. A special verdict should find facts, and not the mere evidence of facts, so as to leave nothing for the court to determine except questions of law. *Langley v. Warner*, 3 N. Y. (3 Comst.) 327; *Sisson v. Barrett*, 2 N. Y. (2 Comst.) 406; *Hill v. Covell*, 1 N. Y. (1 Comst.) 522; *Seward v. Jackson*, 8 Cow. 406. So upon a reference on a specific question of fact, the referee is to find the facts, and not the evidence of such facts; and he is therefore bound by the same rules in regard to the admission or rejection of testimony that are applicable to trials in other cases. It must be borne in mind that the reference here discussed is one in relation to questions of fact which arise upon the pleadings under subdivision 1 of section 271, and not a reference as to questions of fact arising upon motion or otherwise,

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other than upon the pleadings, under subdivision 3 of section 271.

Where a reference is ordered under the latter subdivision, and the referee is directed to take testimony as to any question of fact and report to the court, with his opinion thereon, the referee has no power to decide any thing, but must take all the evidence offered, and leave it to the court, on the hearing of the matter, to determine what is or what is not competent. *Scott v. Williams*, 14 Abb. 70; S. C., 23 How. 393.

In references other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases, the testimony of the witnesses must be signed by them, and the report of the referee filed with the testimony. Rule 39, Sup. Ct.

c. To settle issues. In certain cases referees are appointed to settle the form of issues to be tried by a jury. In cases where the trial of issues of fact is not provided for in section 253 of the Code, if either party desires a trial by jury, such party must, within ten days after issue joined, give notice of a special motion, to be made upon the pleadings, that the whole issue, or any specific question of fact involved therein, be tried by a jury. With this notice of motion must be served a copy of the questions of fact proposed to be submitted to the jury for trial, and in proper form to be incorporated in the order; and the court or judge may settle the issues, or may refer it to the referee to settle the issues. The issues must be settled in the form prescribed in section 72 of the Code. Rule 40, Sup. Ct. So in all actions for a divorce, when issue is joined by the pleadings, upon the question of adultery, such issues cannot be tried by a jury until the issues to be tried are settled in like manner as in other actions, where issues arising out of the pleadings are required to be settled. *Ib.*

The proceedings before the referee should be on notice, as in other cases. The old chancery practice, relating to such references, should be substantially followed. The details of the practice are, however, discussed elsewhere. *Ante*, 294.

d. To take proofs. On a reference to take proofs and report the opinion of the referee thereon, the referee should not attempt to decide any issue, but should simply take all the evidence offered, leaving it to the court to determine what is and what is not competent. *Scott v. Williams*, 14 Abb. 70; S. C., 23 How. 393. See "Reference of specific questions of fact," p. 299, *ante*.

e. To state accounts. The proceedings on a reference to state accounts are substantially the same as under the old chancery practice. *Wiggin v. Gans*, 4 Sandf. 646; *Palmer v. Palmer*, 13 How. 363; *Ketchum v. Clark*, 22 Barb. 319. Under the old practice, however, it was customary to examine a party upon written interrogatories, but, under the Code, this practice may be dispensed with and the examination conducted orally.

This subject is fully treated in the chapter devoted to interlocutory decrees and orders.

f. On judgment by default. On an application to the court for judgment on the failure of the defendant to answer in an action not arising on contract for the recovery of money only, if the taking of an account or the proof of any fact be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account, or hear the proof, or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of money only, or of specific real or personal property, with damages for the withholding thereof, the court may order the damages to be assessed by a jury, or, if the examination of a long account be involved, by a reference. Code, § 246.

The proceedings on a reference to take accounts or proofs have been already noticed. The proceedings on a reference to assess damages are substantially the same as on an ordinary trial by referees. The rules as to the admissibility of evidence are, however, from the nature of the proceeding, in some respects, dissimilar. The cause of action being admitted by the default, no evidence on the part of the plaintiff is needed to substantiate the existence of a right of action, and none can be received on the part of the defendant to disprove it. *Foster v. Smith*, 10 Wend. 377; *De Gaillon v. L'Aigle*, 1 Bos. & Pull. 368; *Green v. Hearne*, 3 Term. R. 301.

The only question for the referee to determine is the amount of damages, and that question must be considered and determined by the referee, on the assumption that the plaintiff has a perfect cause of action, and that all the material averments in the complaint are admitted. *Ib.* See *Hartness v. Boyd*, 5 Wend. 563; *Kerker v. Carter*, 1 Hill, 101; *Gilbert v. Rounsds*, 14 How. 46.

On an inquest taken upon an application for judgment, in an action where the plaintiff's right to more than nominal damages

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depends upon proof of facts showing the amount of injuries sustained, proof of such facts may be admissible, and the defendant may also prove any matter which properly goes in mitigation of damages. *Gilbert v. Rounds*, 14 How. 46; *Bates v. Loomis*, 5 Wend. 134; *Saltus v. Kipp*, 12 How. 342; S. C., 2 Abb. 382; 5 Duer, 646. The assessment of damages in actions of this nature would, however, more properly, be made by a sheriff's jury than by a referee, as they could hardly be said to involve the examination of a long account.

g. To compel making affidavits. When any party intends to make or oppose a motion in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person. Such person may be subpœnaed and compelled to attend and make an affidavit before such referee, the same as before a referee to whom it is referred to try an issue; and the fees of such referee for such service shall be \$3 per day. Code, § 401, subd. 7. See *Motions, Orders and Papers*.

The proceedings on a reference of this nature are sufficiently indicated in the section of the Code above cited. If the party subpœnaed to make the affidavit persists in his refusal, on the hearing before the referee, he may be committed for contempt, as on a refusal to testify upon a trial of the issues of an action under section 272.

h. To examine title. In an action for a partition, where the rights and interests of the several parties, as stated in the complaint, are not denied or controverted, if any of the defendants are infants, or absentees, or unknown, the plaintiff, on an affidavit of the fact, and notice to such of the parties as have appeared, may apply at a special term for an order of reference, to take proof of the plaintiff's title and interest in the premises; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held. Rule 79, Sup. Ct.

So where the referee is further instructed, under the provisions of rule 80, to make inquiries as to the relative merits of an actual partition of the premises, or a sale of the same, and he arrives at the conclusion that a sale is necessary, he may proceed to ascertain and report whether any creditor not a party to the suit has a specific lien, by mortgage, devise, or otherwise, upon

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the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, he may further inquire and report whether the undivided share, or interest of any of the parties in the premises, is subject to a general lien or incumbrance, by judgment or decree; and also ascertain and report the amount due to any party to the suit who has either a general or specific lien on the premises to be sold, or any part thereof, etc.

A reference as to title is often necessary also in actions for the specific performance of a contract for the sale of lands. The proceedings on a reference in an action for partition are special, and are clearly pointed out by the statutes, the rules of court, and the rules of the old court of chancery.

These proceedings will be fully discussed in the chapter devoted to interlocutory decrees and orders, and also in connection with the general practice in actions for partition, specific performance, etc.

It may be briefly stated, however, that the proofs of title produced before the referee are usually furnished by the party conducting the reference, in the form of abstracts, certificates of search, deeds, etc.; and the referee may summon witnesses and examine them as to deaths, intestacy, descent, and such other facts as may be necessary to determine the title, in the same manner as in other cases of reference.

i. To hear claims. References to hear claims are not unfrequent in actions of foreclosure and in creditors' suits. Where a reference is ordered for the purpose of hearing claims to the fund in court in a creditor's action, the order usually directs the creditors or persons to come in before the referee and establish their claims. If the claim of a creditor is not stated or referred to in the pleadings or proofs in the cause, he must present the particulars thereof to the referee, accompanied by an affidavit that the amount claimed is justly due, as set forth in the bill of particulars; and that neither the claimant nor any person by his order, or to his knowledge or belief, for his use, has received the amount thus claimed, or any part thereof, or any security or satisfaction whatsoever for the same or any part thereof. *Morris v. Mowatt*, 4 Paige, 142.

The object of this affidavit is not to prove the claim, but to guard against fictitious claims which the party presenting does

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not regard as founded in justice, although he may be able to produce documentary or other evidence in their support sufficient to show a *prima facie* case of indebtedness. If the claim is contested by any person having a right to contest the same, it must be supported by legal proof, and the referee may examine the claimant on oath as to his claim, or any payments or set-offs which ought in equity to be allowed on account of the same. *Ib.* Upon a reference to ascertainment the rights of parties to the surplus moneys upon a mortgage sale, the proceedings are similar to those just described. See *Hulbert v. McKay*, 8 Paige, 651; Rule 77, Sup. Ct.

These proceedings will be further discussed elsewhere. See *Creditor's Suits, Actions for Foreclosure, etc.*

j. To make inquiries. References are frequently ordered to make inquiries. These inquiries may be as to persons or as to facts, titles, liens, etc. Where the reference is to make inquiries as to persons, the mode in which the inquiries are to be prosecuted are usually specified in the interlocutory or decretal order. When the reference is directed as to facts, titles, liens, etc., the referee should follow the general course of procedure heretofore specified. See *ante*, p. 294. See, also, *Interlocutory Decrees and Orders*.

k. Miscellaneous cases. It would be idle to attempt to enumerate the various cases in which a reference may be ordered, or to attempt to point out the practice in every case of reference. The practice already pointed out will, in a general way, cover nearly every case in which a reference may be ordered, and in connection with the general directions contained in the order of reference, will sufficiently indicate the character of the proceedings before the referee. As to the proceedings on a reference to obtain a divorce. See *Divorce*; see, also, Rules 87, 89, 91 of Sup. Ct.

For mode of proceeding on a sale by referee, see *Foreclosure*; see, also, Rules, 73-76, 81.

For the practice on a reference in an action for partition, see *Partition*; see, also, Rules 79-81.

Section 4. The report.

a. In general. A referee having heard the parties, their witnesses and counsel, in respect to the matters submitted to him for adjudication, and having reached a conclusion in his own mind in respect to the questions of law or fact arising thereon,

should next proceed to embody such conclusions in a document in writing, which, under the Code, is termed a report.

The term, "certificate," is almost unknown, as applied to a writing embodying the conclusions of a referee in respect to the merits of the questions submitted to him to determine. If employed at all under the present practice, to designate any written decision of a referee, the term is confined and applied to such writings only as are intended to convey to the court information in respect to some single act of the referee, generally of a ministerial nature, and relating to some question of practice. A referee may, in the trial of a cause, require the aid of the court, to enforce some proceeding which he has not the authority to compel, and which the court will direct, as of course. In such case a written statement of the fact that such action on the part of the court is necessary, given over the signature of the referee, is termed a certificate. How far such statement differs from what is known under the Code as a report, may be seen from the requirements of the Code and rules of court as to the form and contents of a referee's report.

b. Form and contents. The general rules as to the form of a report by a referee are declared by the Code and by the rules of the supreme court. Both require that upon a trial by referees they shall, in their decision and final report, state the facts found by them, and their conclusions of law separately. Rule 39, Sup. Ct.; Code, § 272.

It is a matter of right with either party to have separate findings of fact and conclusions of law inserted by the referee in his report. This right is secured by statute, and is substantial, inasmuch as these findings and conclusions enable the successful party to determine whether or not to appeal; and in case he desires to appeal, they are indispensable to enable him to frame and serve his exceptions in due time, and to present the case in proper form for review. *Van Slyke v. Hyatt*, 46 N. Y. (1 Sick.) 259; *Tilman v. Keane*, 1 Abb. N. S. 23; *Rogers v. Beard*, 20 How. 282. The report should contain a sufficient statement of facts to form a basis for the conclusions of law, and to substantially show the disposition made by the referee of the specific issues in the cause, or of such of them as are embraced in his determination. A mere general conclusion of indebtedness or no indebtedness, is not a sufficient compliance with the provisions of the Code, and serves none of the purposes for which it

was intended. *Van Slyke v. Hyatt*, 46 N. Y. (1 Sick.) 259. The decisions in the court of appeals holding that the report of a referee, or the decision of a judge, where the trial is by the court, for the purpose of authorizing the judgment and forming a part of the record, need only state in general terms what the judgment is to be, without any finding of facts, or statement of the conclusion of law, must be considered as overruled. *Van Slyke v. Hyatt*, 46 N. Y. (1 Sick.) 259; *Manley v. Insurance Co. of North America*, 1 Lans. 20, 23. See *Johnson v. Whitlock*, 13 N. Y. (3 Kern.) 344; S. C., 12 How. 571; *Otis v. Spencer*, 16 N. Y. (2 Smith) 610; S. C., 15 How. 425; 6 Abb. 127.

Thus, in an action for work and labor, where the double defense is interposed that the work and labor was done upon a special contract which was not performed, and also that the defendants suffered damage from the non-fulfillment of the contract, which they claim to recoup, the referee should find distinctly what the contract between the parties was, if there was a special contract, and if there was no special contract he should find what contract should be implied from the acts and declarations of the parties, and then should find whether the plaintiff performed such a contract, and if he did not perform it, whether performance was accepted or waived, so as to entitle the plaintiff to recover the price, and whether there was or was not such a breach of the contract on the part of the plaintiff as to let in the defendant's recoupment. *Rogers v. Beard*, 20 How. 282. It is not sufficient in such case that the referee finds that the work was done for a price agreed upon by the parties, and finds for the plaintiff for such price generally, but does not find, except inferentially, what the contract in fact was, or whether it was performed by the plaintiff and does not find upon what ground the defense was overruled. *Rogers v. Beard*, 20 How. 282.

But a referee is not required to find upon any other facts than those which enter into and form the basis of the judgment to be entered upon his report. He is not required to negative in express terms any other facts. Facts not found are necessarily negatived by implication. *Sermont v. Baetjer*, 49 Barb. 362; *Nelson v. Ingersoll*, 27 How. 1; *McAndrew v. Whitlock*, 2 Sweeny, 623; *Perine v. Hotchkiss*, 2 Lans. 416; *Manley v. Insurance Co. of North America*, 1 Lans. 20; *Patterson v. Graves*, 11 How. 91; *Ingraham v. Gilbert*, 20 Barb. 151. Neither is the referee obliged to notice in his report issues raised by the

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pleadings but upon which no evidence is given upon the trial. *Ib.* So where a fact litigated upon the hearing is material only as a link in the chain of evidence, but is immaterial to the issues as an independent proposition, the referee is not required to report his conclusions in respect to the existence of that fact, but should simply report upon the issues. *Wiltzie v. Eaddie*, 4 Abb. N. S. 393. A referee is required to report upon the issues only, and not upon the evidence; and having reported his conclusions as to a fact, he is not called upon to find or explain the means and processes by which he arrived at such conclusions. *Ib.*; *Patterson v. Graves*, 11 How. 91; *Dorr v. Noxon*, 5 id. 29.

The findings of fact by the referee should be direct, positive and explicit. A report is clearly insufficient which refers argumentatively and in a general way to the conclusions of law and fact at which the referee arrived, but fails to state directly what facts were found by him. *Mills v. Thursby*, 12 How. 417.

c. *When to be made.* The Code requires the referee or referees to make and deliver a report within sixty days from the time the action shall be finally submitted, and that in default thereof, and before the report is delivered, either party may serve notice upon the opposite party that he elects to end the reference; and thereupon the action shall proceed as though no reference had been ordered, and the referees shall not in such case be entitled to any fees. Code, § 273. The object of this provision of the Code is to expedite decisions in referred cases and to enable either party to enforce promptness. It was not, however, intended to take away from parties the control of the practice in their own suits, nor to prohibit them from extending the time for making and delivering the report. And, although the Code declares that the report shall be made and delivered in sixty days, the parties may nevertheless extend such time by a written consent, or by oral agreement at the hearing, and this consent, so given, may be enforced. *Livingston v. Gidney*, 25 How. 1.

As this provision of the statute was enacted for the benefit of the parties, the privileges conferred by it may be waived in the same manner as privileges conferred by other statutes having a similar object. Thus, if the referee fails to report within the sixty days allowed by statute, but makes and delivers his report thereafter, and before either party has in any way signified his intention to proceed with the trial as though no reference had been had, the parties will be deemed to have waived all objection

The report — When to be made.

to the failure to report within the statutory time, and also their right to proceed in the action as if no reference had been ordered. The statute contemplates that some step shall be taken in the cause after the expiration of the sixty days, indicating an intention to disaffirm the right of the referee to make and deliver his report. *Mantles v. Myle*, 26 How. 409; *Livingston v. Gidney*, 25 id. 1; *Foster v. Bryan*, 26 id. 164; S. C., 16 Abb. 396.

The same rule applies where the parties have, by stipulation, extended the time within which the report may be made, and the referee has made and delivered his report after the expiration of the time mentioned in the stipulation, but before either party has signified his intention to disregard the reference and proceed to trial. *Thiesselin v. Rossett*, 3 Abb. N. S. 54. The parties may by stipulation extend the time within which the referee may make his report, but they cannot by stipulation limit the time so extended. The effect of extending the time to report is to waive the privilege of either party to elect to terminate the reference by the service of a notice upon the other. *Ib.*

Where one of the parties to a reference, by stipulation or any other act, induces the referee to delay the making and delivering of his report beyond the sixty days, and, during the delay so caused by himself, proceeds with the action as if no reference had been ordered, the court may, on motion, for the purpose of preventing such procedure, allow the report to be made and delivered after the expiration of the sixty days. But where there has been no act of the party to delay the referee, and no order within the sixty days for further time, or notice given within that time of a motion for such order, it is the duty of the referee to deliver his report within that time, and, if he fails to do so, either party may elect to end the reference, and the intent to do so having been shown, the court has no power to continue the reference by an order allowing the referee further time to make and deliver his report. *Niles v. Maynard*, 28 How. 390. See *Litch v. Brotherson*, 16 Abb. 384; S. C., 25 How. 407.

The rule, that a referee must make and deliver his report within sixty days from the time the action shall be finally submitted to him, does not apply to a referee to whom a claim against the estate of a deceased person has been referred, under the statute, with the approval of the surrogate. Section 273 of the Code applies only to references of issues in actions commenced as prescribed by the Code. *Goddard v. Porter*, 17 Abb. 374.

d. Compelling report. By providing that a referee shall forfeit his fees unless he shall make and deliver his report within sixty days from the time the action was finally submitted to him, the Code has rendered almost unnecessary any mode of proceeding to compel a referee to report. But, in cases where the necessity exists, the delivery of the report may be compelled by an order of the court, that the referee report within a specified time, or in default thereof an attachment issue. *Thompson v. Parker*, 3 Johns. 260; *Stafford v. Hesketh*, 1 Wend. 71.

Where the parties have waived their right to elect to end the reference by stipulating to extend the time within which the report may be made, this is the only remedy if the referee unnecessarily delays to report. *Thiesselin v. Rossett*, 3 Abb. N. S. 54.

e. Report, how agreed on. When an action is referred to several referees, and the cause has been submitted to them for their decision, any two of them may make a report in the case. 2 R. S. 384 (399), § 46. But while two of three referees may make a valid report, they must proceed to do so in a regular manner. Thus, all the referees must have notice of the meeting to frame the report. *Brower v. Kingsley*, 1 Johns. Cas. 334. And there must be a conference of all, and a substantial conclusion by a majority, embodied in a report made by them when they are together. *Townsend v. Glen's Falls Ins. Co.*, 10 Abb. N. S. 277. See *Harris v. Norton*, 7 Wend. 531; *M'Inroy v. Benedict*, 11 Johns. 402. And after the hearing of the cause before three referees, and a consultation in which a majority fail to agree upon a conclusion or any findings, two of them cannot make a report by signing separately their conclusions, nor can two, upon a conference, agree to a conclusion, and make a report without a conference of all. *Townsend v. Glen's Falls Ins. Co.*, 10 Abb. N. S. 277. But where, upon a conference of all, a report is agreed upon by two of three referees, and the third agrees to dissent from their conclusion, the report will be valid, although not signed by the two who agree, until the next day, and in the absence of the third. *Clark v. Frazer*, 1 How. 98.

f. Report upon all the issues. The contents of a report upon all the issues and the general rules relating to its form, have been discussed in subdivision *b* of this section. See *ante*, p. 305.

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General form of the report on all the issues — Report in action for divorce.

General form of report on all the issues.

(Title of cause.)

To the court of :

The undersigned, appointed by this court a referee to hear and determine this action and the issues therein, having duly considered the allegations and proofs of the parties, and having heard , for the plaintiff, and , for the defendant, reports to the court as follows:

I find, as matters of fact:

I. That, etc.

II. That, etc.

I find, as matters of law:

I. That, etc.

II. That there is due to the plaintiff from the defendant the sum of dollars, with interest from the day of , 18 , being dollars, which amount to dollars; for which said plaintiff is entitled to judgment in this action against the said defendant, besides costs.

(Or, if the defendant is entitled to judgment.)

III. That the defendant is not indebted to the plaintiff, as alleged in this action, and that the defendant is entitled to judgment against said plaintiff for his costs.

(Date.)

(Signature.)

Report in action for divorce (for plaintiff.)

(Commencement as in preceding form.)

I find, as conclusions of fact:

I. That, on the day of , 18 , the plaintiff intermarried with the defendant at , in the State of .

II. That, thereafter, and until about the day of , 18 , the plaintiff continued to live with the defendant as his wife.

III. That, during such time, they had children, issue of said marriage, namely: *(give names and ages.)*

IV. That both husband and wife were, at the time of the commission of the several acts of adultery hereinafter mentioned, inhabitants of this State. *(Or, if the marriage was within this State)* That the plaintiff, at the time of the commission of the several acts of adultery hereinafter mentioned, was, and now is, an actual inhabitant of this State. *(Or if the adultery was committed in this State)* That the plaintiff, at the time of commencing this action and filing her complaint, was an actual inhabitant of this State.

V. That, in the month of , 18 , at , the defendant committed adultery with one .

VI. That the said adultery was committed without the consent, connivance, privity or procurement of the plaintiff.

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Report in actions for divorce — For plaintiff — For defendant.

VII. That five years have not elapsed since the plaintiff discovered the fact of such adultery.

VIII. That the plaintiff has not voluntarily cohabited with the defendant since the discovery by her of such adultery.

IX. That the defendant is a man of property, being worth, in real and personal estate, dollars, of which the clear income is about dollars, and receives, also, an income from the practice of his profession as a .

X. That the plaintiff has both real and personal property to the value of dollars, which she acquired by .

I find as conclusions of law :

I. That a divorce should be decreed in favor of the plaintiff dissolving said marriage for the adultery so committed by the defendant.

II. That the defendant should pay to the plaintiff the sum of dollars each year from the date of the judgment herein, in equal quarterly payments, for the support and maintenance of the plaintiff, and of the children, and the education of the latter ; giving security therefor by a mortgage on his estate, at , known as .

III. That the plaintiff have the care and custody of said children.

IV. That the plaintiff is entitled to said property which she now has, as her sole and absolute property.

V. That the defendant pay the costs of this action to be taxed, and the plaintiff to have judgment therefor.

(Signature.)

(Date.)

Report in action for divorce (for defendant).

(Commencement and statement of facts as in preceding form to V.)

V. That the plaintiff has failed to prove any of the acts of adultery charged in the complaint herein.

I find as conclusions of law :

I. That the defendant is not guilty of any of the acts of adultery charged in the complaint.

II. That all of the aforesaid children are the issue of said marriage, and the legitimate children of the plaintiff and defendant.

III. That the complaint should be dismissed (with costs).

(Signature.)

(Date.)

g. Report on particular questions. Upon a reference to examine and report as to the existence or non-existence of a fact, or as to any other matter, it is the duty of the referee to draw the conclusion from the evidence produced before him, and to

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Report on questions of alimony and expenses in an action against a wife, etc.

report that conclusion only. It is irregular and improper for him to set forth the evidence in his report without special direction of the court. *In the Matter of Hemmip*, 3 Paige, 305. It is provided by a rule of the court, that in references other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases, the testimony of the witnesses shall be signed by them, and the report of the referee shall be filed with the testimony. Rule 39, Sup. Ct.

The report of a referee on a reference of this nature should be confined to the questions referred, leaving all other questions to be determined by the proper tribunal. See *Herforth v. Herforth*, 2 Abb. N. S. 483.

Report on question of alimony and expenses in an action against a wife for a divorce.

(Title of cause.)

To the supreme court of the State of New York:

In pursuance of an order of this court, dated the day of , 18 , whereby it was referred to me, the undersigned, as referee, to inquire and report a reasonable sum to be allowed to the defendant, in this action, for her support and maintenance, and that of her children residing with her, and a reasonable sum to carry on her defense and to defray costs and expenses thereof, and also as to the times and manner in which such sums should be paid, I, the said referee, do report:

I. That I have been attended by the attorneys for the plaintiff and defendant; and having heard the allegations and proofs as to the value of the plaintiff's estate at the time of the commencement of this action, and the allowances proper to be made, do also report, that the real property of the plaintiff consisted, at such time, of , the whole value being estimated at . That the whole personal property of the said plaintiff consists of , and its value is about .

II. I also report that two children of the plaintiff and defendant live with and are entirely supported by the defendant, namely: , a boy aged years; and , a girl aged years.

III. And I find and report that in my opinion the sum of dollars a year, payable quarterly, is a suitable allowance for the present separate maintenance and alimony of the defendant; and that it ought to be payable from the day of , 18 , being the date of the said order of reference. And I report that dollars would be a reasonable sum to be allowed to the defendant to enable her to carry on her defense and defray the necessary costs and expenses of this action.

(Date.)

(Signature.)

h. Report on title. Where a reference is ordered as to title, the referee should report whether the title is good or not, and if he decides that the title is not good he should state the precise points wherein it is defective. *Green v. Monks*, 2 Molloy, 325.

When the referee finds that the title is good and was always so, a general report to that effect is sufficient; but where the title was formerly defective but has been made good but a short time previous to the reference, the referee should report when the title became perfect, if it is within the scope of the matters submitted to him. See *Hyde v. Wroughton*, 3 Madd. 279; *Anonymous*, id. 495.

If the only defect in the title is an outstanding mortgage, the referee should report that upon payment of the mortgage a good title could be made. *Esdaille v. Stephenson*, 6 Madd. 366.

i. Delivery. The referee having signed his report should next deliver it to the successful party in order that he may enter up judgment thereon. *Richards v. Allen*, 11 N. Y. Leg. Obs. 159. No other party is entitled to the report. *Ib.* And it is improper for the referee to deliver to the parties two documents, each of which purports to be the original of his report, even if they are duplicates. *Currie v. Cowles*, 7 Rob. 3.

A referee has a right to the payment of his fees before the delivery of his report, and if any dispute arises as to the amount, the question may be settled by requiring the referee to have the amount taxed. See *Richmond v. Hamilton*, 9 Abb. 71, note; *Richards v. Allen*, 11 N. Y. Leg. Obs. 159; *Shultz v. Whitney*, 9 Abb. 71; S. C., 17 How. 471.

If the successful party neglects or refuses to take up the report when requested to do so, the adverse party may procure an order from the court directing the prevailing party to take up the report and enter judgment, or that in default thereof the adverse party may do so. *Richmond v. Hamilton*, 9 Abb. 71, note. In references other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases, the report of the referee must be filed with the testimony and a note of the day of the filing must be entered by the clerk in the proper book under the title of the cause or proceeding. Rule 39, Sup. Ct.

j. Alteration and amendment. After the report has been signed and the successful party notified of that fact, the power of the referee is determined and he cannot afterward amend or

alter it in any respect. *Shearman v. Justice*, 22 How. 241; *Ayrault v. Sackett*, 17 id. 507; S. C., 9 Abb. 154, note; *Niles v. Price*, 23 How. 473; *Voorhis v. Voorhis*, 50 Barb. 119; *Nelson v. Ingersoll*, 27 How. 1. See p. 288, *ante*.

k. Conclusiveness. As a general rule, the report of a referee, like the verdict rendered by a jury, is conclusive upon all questions of fact upon which there has been conflicting evidence. *Watkins v. Stevens*, 3 How. 28; *Van Ness v. Bush*, 22 id. 481; S. C., 14 Abb. 33; *Monell v. Marshall*, 25 How. 425; *Dows v. Montgomery*, 5 Rob. 445; *Hoogland v. Wight*, 20 How. 70; S. C., 7 Bosw. 394; *Sinclair v. Tallmadge*, 35 Barb. 602.

A report of a referee will be set aside only where the findings are clearly against the weight of evidence, or where, upon the trial, some rule of evidence or principle of law has been violated. *Ib.* So much depends on the appearance and conduct of the witness, that it is never safe to interfere with a finding on a question of fact unless it is so flagrantly unjust as to show partiality, corruption or incompetency on the part of the referee. *Howell v. Bidlecom*, 62 Barb. 131. A referee has a right to find a witness mistaken, and if there is a contradiction between him and another, to decide the question of fact contrary to his statement. But he cannot judicially deem an uncontradicted witness testifying against the party calling him, false and perjured, and so holding to infer the truth of the matter to be the reverse of what was testified. *Fordham v. Smith*, 46 N. Y. (1 Sick.) 683. A judgment entered upon the report of a referee will be reversed when it is entirely and clearly against the evidence. *Butler v. Truslow*, 55 Barb. 293.

l. Construction. Where the facts which constitute a transaction are stated in detail in a referee's report, his finding as to their effect is a conclusion of law. *Hotchkiss v. Mosher*, 48 N. Y. (3 Sick.) 478. In construing and reviewing the report of a referee, the whole report should be taken together, and if all parts of it thus considered and construed cover the case, and show that it was in fact decided upon correct principles, a judgment rendered upon it will be sustained. *Voorhis v. Voorhis*, 50 Barb. 119.

A finding by a referee, that an assignor for the benefit of his creditors had no actual design to defraud his creditors by making the assignment, will be construed as a finding that the assignment was made in good faith and without an intent to defraud credit-

ors. *Casey v. Janes*, 37 N. Y. (10 Tiff.) 608; S. C., 5 Trans. App. 327.

The general conclusion of the referee is to be construed as involving a finding upon all the material questions, though not expressed in terms. *Grant v. Morse*, 22 N. Y. (8 Smith) 323.

If the findings of a referee are ambiguous, that construction will be adopted which will sustain the judgment, rather than that which will lead to a reversal. The rule is, that the findings are to receive the most favorable construction of which they are capable, for the purpose of upholding the judgment. *Hill v. Grant*, 46 N. Y. (1 Sick.) 496.

m. Confirmation. The Code declares that the report of a referee upon the whole issues shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. Code, § 272. Upon a reference of this nature, it is regular to file the report and enter judgment without any further application to the court. *Bouton v. Bouton*, 42 How. 11; *Currie v. Cowles*, 7 Rob. 3.

Neither is it necessary, under the present rules of court, to move for a confirmation of the report of a referee on a reference other than one for the trial of the issues. Where no exceptions are filed and served within eight days after the service of a notice of the filing of the report, the report will become absolute, and stand in all things confirmed without any special order of the court. See Rule 39, Sup. Ct.

Where the confirmation of a report is necessary, a party cannot obtain a vested right therein until it is confirmed and judgment entered thereon. *Matter of Widening Broadway*, 61 Barb. 483; *Lewenthal v. Mayor, etc., of New York*, 61 id. 511; *Matter of Palmer*, 40 N. Y. (1 Hand) 561.

n. Referee's fees. In the absence of any agreement between the parties, a referee is entitled to \$3 per day for every day spent in the business of the reference. Code, § 313. The parties may, however, agree in writing upon any other rate of compensation. *Ib.* Or if the parties enter into a verbal agreement at the hearing, fixing upon a compensation other than that allowed by statute, and this agreement is entered by the referee in his minutes, this will be in effect an agreement in writing, within the meaning of the statute, and the referee will be entitled to the rate of compensation so agreed upon. *Philbin v. Patrick*, 22 How. 1. So where the parties on a reference come before the

Referee's fees.

referee, and agree orally that the referee may charge whatever he deems his services worth, they will be estopped by this agreement from objecting that the amount charged is in excess of the rate allowed by statute where no agreement has been entered into in writing. In cases of this nature a written agreement is waived. *Thurman v. Fiske*, 30 How. 397.

The referee may compel the payment of his fees by withholding his report until his claims are paid by the successful party. He has the same lien upon the report for his fees that a counselor has upon his written opinion. *Ott v. Schroepel*, 3 Barb. 56. If the party deems the referee's claim for fees excessive he should require the referee to have the amount taxed by the clerk. *Richmond v. Hamilton*, 9 Abb. 71, note. The clerk is required by the Code to insert in the entry of judgment, on the application of the prevailing party, and upon due notice to the other, the sum of the allowances for costs as provided by the Code, and the necessary disbursements, including the fees of referees. Code, § 311. These disbursements must be stated in detail and verified by affidavit, and a copy of the items composing the costs and disbursements must be served with the notice of adjustment. *Ib.*

When the sum claimed by the referee is objected to, and no writing is produced agreeing upon any particular compensation, the allowance cannot exceed \$3 for each day spent in the business of the reference; and if the time actually spent by the referee is disputed, the amount of time devoted to the reference must be shown affirmatively by affidavit or other equally competent proof. *Shultz v. Whitney*, 17 How. 471; S. C., 9 Abb. 71. A referee is entitled to no fees for services performed by proxy. *Ib.*

In the absence of any waiver by the parties of the right to require a delivery of the report within sixty days from the time of the final submission of the cause, the referee will forfeit his fees by not signing and delivering his report within that time. *Foster v. Bryan*, 26 How. 164; S. C., 16 Abb. 396; *Niles v. Maynard*, 28 How. 390. But where the parties have by stipulation left the time of delivering the report discretionary with the referee, the rule as to a forfeiture does not apply, and on the adjustment of costs and disbursements, the clerk may allow the referee the amount of fees to which he is entitled, notwithstanding the fact that the report was delivered after the expiration of sixty days. *Foster v. Bryan*, 26 How. 164; S. C., 16 Abb. 396.

Assigning report — Exceptions to report.

An attorney, in a cause tried by a referee, is not liable for the fees of the referee. *Howell v. Kinney*, 1 How. 105; *Judson v. Gray*, 11 N. Y. (1 Kern.) 408. Nor can the referee compel the payment of his fees by the attorney by attachment, even where the latter has received money belonging to his client which is sufficient for that purpose. *Lamoreux v. Morris*, 4 How. 245.

The fees of referees in sales in partition cases, in the city and county of New York, have been fixed by statute. Laws of 1869, ch. 569, § 4. This act has, however, been declared unconstitutional. *Gaskin v. Meek*, 42 N. Y. (3 Hand) 186; S. C., 8 Abb. N. S. 312.

o. Assigning report. The party in whose favor a report of a referee has been made may make a valid assignment of the report, with all his interest therein; and the assignee may thereupon cause himself to be substituted in the place of the original party, and enter up judgment in his own name. The judgment so entered may be enforced against the judgment debtor, and any judgment which such debtor may obtain against the assignor subsequent to the assignment cannot be set off against it. *Roberts v. Carter*, 17 How. 341; S. C., 9 Abb. 366, note; affirmed, 38 N. Y. (11 Tiff.) 107; 6 Trans. App. 253; 35 How. 642, note.

Section 5. Exceptions to report.

a. In general. Whenever a party to a reference deems that injustice has been done him by the decision of the referee, as embodied in his report, he should at once take the necessary steps to procure a review of the report, or so much as he deems objectionable. The proper steps to procure a review of the report of a referee are prescribed by the Code and the rules of court. These proceedings will be fully noticed hereafter. See section 8, "Reviewing report," p. 324, *post*. In this connection it will be sufficient to point out the mode of taking the initiatory steps toward a review, by way of exception to the report.

It must be borne in mind that there are two classes of exceptions authorized by the Code. In the one class are exceptions to the rulings of the referee upon the hearing, as to the admission or the rejection of evidence, and questions of a kindred character. All exceptions of this class must have been taken at the time the rulings were made, or the right to except will have been waived. *Belmont v. Smith*, 1 Duer, 675; S. C., 11 N. Y. Leg. Obs. 216; *Brewer v. Isish*, 12 How. 481; *Hunt v. Bloomer*, 13

Exceptions to report.

N. Y. (3 Kern.) 341; S. C., 12 How. 567. See *Johnson v. Whitlock*, 13 N. Y. (3 Kern.) 344; S. C., 12 How. 571.

In the other class are exceptions which could not have been taken on the trial, and which section 268 of the Code allows to be taken within ten days after notice in writing of the judgment. This class includes all exceptions to the legal conclusion of the referee arising upon the facts found by him in his report, or, in the phraseology of the Code, "to a decision on a matter of law arising on the trial." It is the latter class of exceptions which will be considered in this section, and it must be distinctly understood that, in treating of exceptions to the report of a referee, no reference is made to the exceptions to the rulings of the referee on the trial, in respect to admitting or excluding evidence. It is only rulings contained in the written decision of the referee that can, for the first time, be made the subject of exception after judgment, and such exceptions are allowed only because there was no opportunity to make them on the trial. *Johnson v. Whitlock*, 13 N. Y. (3 Kern.) 344; S. C., 12 How. 571. The exceptions which may be made after judgment are those, and those only, which, under the former system of practice, were made to the rulings of the court after the evidence was closed and before the jury retired. *Hunt v. Bloomer*, 13 N. Y. (3 Kern.) 341; S. C., 12 How. 567. But since, on a trial by a referee, the referee assumes the double office of court and jury, and has no occasion to rule upon the effect of the evidence given upon the hearing, until he makes his final decision, in the form of a report, it is obvious that on the hearing the parties have no opportunity to except to the legal conclusions of the referee.

For this class of cases the framers of the Code have attempted to provide, by declaring that, upon the trial of a question of fact by the court or a referee, either party may except to a decision on a matter of law arising upon such trial, within ten days after notice in writing of the judgment, in the same manner and with the same effect as upon a trial by jury. Code, § 268; *Tremain v. Ryder*, 13 How. 148.

Exceptions to a referee's findings of facts are idle and of no avail, as the remedy is by another mode of procedure, which will be explained hereafter. See *Lefler v. Field*, 50 Barb. 407; *Russell v. Duffon*, 4 Lans. 399. But exceptions to the conclusions of law stated in a referee's report are indispensable to raise any questions for review. *Weed v. New York & Harlem R. R.*

Who may except — When to except — How to except.

Co., 29 N. Y. (2 Tiff.) 616; *Enos v. Eigenbrodt*, 32 N. Y. (5 Tiff.) 444; *Russell v. Duflon*, 4 Lans. 399.

b. Who may except. Exceptions to the report of a referee on an interlocutory reference, or on a reference of the whole issues, may be taken by any party to the suit who is interested in the matter in controversy. Where there are several sets of parties appearing by different attorneys, they may each take exceptions to the same points, although their grounds of exception are the same.

On a reference as to claims, etc., creditors who have established their claims before the referee may except to the report, although they are not parties to the suit, and so, also, may creditors who have preferred claims which have been rejected. Under the old practice, it was necessary to first obtain permission of the court, which would be granted on motion as of course.

Persons claiming as next of kin, whose claims have been disallowed by the referee, may also except. So may a purchaser under a decree of sale.

c. When to except. All exceptions to a report of a referee upon the whole issue must be made and served upon the opposite party within ten days after written notice of the filing of the report. Rule 41, Sup. Ct.; Code, § 268.

Exceptions to a report, other than upon the issues, must be taken within eight days after the service of the notice of the filing of the report. Rule 39, Sup. Ct.

Under the provisions of section 174 of the Code, the court has power to allow exceptions to be filed, or a case served, after the time prescribed therefor has expired. *Strong v. Hardenburgh*, 25 How. 438; *Sheldon v. Wood*, 14 id. 18; S. C., 6 Duer, 679; *Bortle v. Mellen*, 14 Abb. 228. But a judge at chambers has no power to extend the time to make a case or to serve exceptions after the ten days have expired. That power is vested only in the court. *Sheldon v. Wood*, 14 How. 18; S. C., 6 Duer, 679; *Doty v. Brown*, 3 How. 375.

d. How to except. Exceptions must be properly taken in order to be available. A mere general exception to a conclusion of law is not sufficient. Exceptions must be specific, and not general. An exception to a referee's "conclusions of law, and to each and every part thereof," is so general, as to hardly raise any question of law whatever, and at most can only raise the question whether any of the conclusions of law are justified by the facts found.

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Form of exception to report — Serving and filing exceptions.

Lester v. Field, 50 Barb. 407. So an exception to that part of a decision which allows a specified sum as interest is only a general exception to the allowance of any interest whatever, and will not raise the question that interest has been allowed from too early a date. To raise this question, the exception should specifically point out the error in the allowance of interest, in order that the prevailing party may remit the excess. *McMahon v. New York & Erie Railroad Co.*, 20 N. Y. (6 Smith) 463; *Graham v. Chrystal*, 1 Abb. N. S. 121; S. C., 32 How. 287; S. C. affirmed, 2 Keyes, 21; *Matthews v. Duryee*, 4 id. 525; *Sipperly v. Stewart*, 50 Barb. 62.

Form of exception to report.

(*Title of cause.*)

The plaintiff (*or defendant*) excepts to the report of A. B., Esq., referee herein, dated the day of , 18 .

I. For that said referee reported that, etc.

II. For that said (*etc., as above, taking a separate exception for each separate objection*).

(*Signature.*)

(*Date.*)

(*Direction.*)

e. Serving and filing exceptions. The Code provides that, for the purposes of an appeal, either party may except to a decision on a matter of law arising upon such trial within ten days after notice in writing of the judgment, in the same manner and with the same effect as upon a trial by jury. Code, § 268. The object of serving exceptions to the report, as has been already explained, is to notify the adverse party of the precise grounds of objection to the report, and the general scope of the argument on appeal. These exceptions must be served within the ten days allowed by the statute, unless the time for service has been extended by an order of the court. *Johnson v. Whitlock*, 12 How. 571; S. C., 13 N. Y. (3 Kern.) 344.

This time may be extended by the court at special term, even after the time of excepting has expired, or by a judge at chambers, if before the expiration of the ten days allowed by statute. *Sheldon v. Wood*, 14 How. 18; S. C., 6 Duer, 679; *Strong v. Hardenburgh*, 25 How. 438; *Haase v. New York Central Railroad Co.*, 14 id. 430; *Doty v. Brown*, 3 id. 375. It may also be extended by stipulation; but the general term has no jurisdic-

tion to entertain an application of this nature. *Strong v. Hardenburgh*, 25 How. 438.

Ordinarily, in addition to the exceptions to the report of a referee, the party desiring to appeal may wish to review decisions made in the course of the hearing. These exceptions, although entirely distinct from the exceptions to the report, and have no relation thereto, are, for the purposes of a review, embodied in a case containing the evidence necessary to raise the point of law, and served, settled and filed, in accordance with the rules of the supreme court.

When such case is prepared and served within the time allowed to except to the report, it may contain such exceptions, and there will be no occasion to file or serve them as separate matter. The service and filing of the exceptions to the report with the case will be a sufficient compliance with the statute. *Johnson v. Whitlock*, 12 How. 571; S. C., 13 N. Y. (3 Kern.) 344.

Section 6. Report on interlocutory reference.

a. In general. The subject of interlocutory decrees and orders, including interlocutory references, is elsewhere fully discussed, and the form, contents and peculiarities of the report of a referee therein is stated in connection with the matters there presented.

b. Form and contents. The form and contents of the report has also been briefly discussed in a preceding section of this chapter. See p. 311, 312, *ante*.

c. Confirmation of. Prior to the adoption of rule 39 of the supreme court, every report which was necessary for the purpose of enabling the court to make some discretionary order or some decree thereon, whether the order directing the reference was made upon decree or upon an interlocutory application, required confirmation, before its adoption, as the foundation of such future order or decree. *Griffing v. Slate*, 5 How. 205; S. C., 3 Code R. 213. See *Belmont v. Smith*, 1 Duer, 675; S. C., 11 N. Y. Leg. Obs. 216; *Elmore v. Thomas*, 7 Abb. 70. But, under the rule as it now exists, a report on an interlocutory reference becomes absolute, and stands in all things confirmed, unless exceptions thereto are filed and served within eight days after the service of the notice of the filing of the same. Rule 39, Sup. Ct. If exceptions are filed and served within that time, the same may be brought to a hearing at any special term thereafter, on the notice of any party interested therein. See Rule 39, Sup. Ct. Unless

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Proceedings upon report, on reference of all the issues.

such exceptions are filed as provided by the rule, no special order of confirmation is necessary.

The report cannot be acted upon, however, and made the foundation of any further proceedings until the time allowed by the rule for the filing and service of exceptions has expired, unless the parties who have appeared, and who are thereby entitled to notice of the filing of the report, by a written consent waive the delay of eight days. Should none of the defendants appear, or should such as have appeared waive the delay, the report may be presented to the court for the final order of confirmation and judgment, without waiting the prescribed time. *Somers v. Miliken*, not reported. See Voorhies' Code (6th ed.), 616.

d. Subsequent proceedings. See Interlocutory Decrees, etc.

Section 7. Proceedings upon report, on reference of all the issues.

a. In general. The party to whom a report of a referee has been delivered should file his report and proceed to perfect judgment. He should next serve a copy of the report, with a notice of the judgment, on the adverse party. This service fixes the date from which the time to serve exceptions is to be computed. Rule 39, Sup. Ct.

Form of notice of referee's report and of judgment.

(Title of cause.)

SIR: Please take notice, that the annexed is a copy of the referee's report on the issues herein; and also that judgment thereon and pursuant thereto was filed in the office of the clerk of this court at _____, in _____, on the _____ day of _____, 18 ____.

(Address.)

(Signature.)

b. On all the issues. If the report was made under a reference of all the issues, it stands as a decision of the court, and judgment may be entered thereon in the same manner as upon such decision. Code, § 272; *Renouil v. Harris*, 1 Code R. 125; S. C., 2 id. 71; 2 Sandf. 641; *Currie v. Cowles*, 7 Rob. 3; *Griffing v. Slate*, 5 How. 205; S. C., 3 Code R. 213. No leave of court or confirmation of the report is necessary. *Ib.*

c. On specific questions. As the Code provides that where the reference is to report the facts, the report shall have the effect of a special verdict, the reference must be regarded in the light of a trial of the issues arising on the pleadings; and after the filing of the report, and the lapse of eight days from notice thereof, it

Entry of judgment.

becomes absolute and stands in all things confirmed, without any special order, unless exceptions thereto have been duly filed and served. In the latter case the exceptions may be brought to a hearing at any special term, on the notice of any party interested. Rule 39, Sup. Ct.

If the reference be of but one or more of the issues, leaving others still undetermined, the notice served with the copy of the report, should be to the effect that the party will bring the cause to trial, and move upon the issues so found, and the other issues to be determined by the court, for judgment.

d. Entry of judgment. As has been previously stated, the Code pays the same respect to the decision of a referee to whom all the issues are referred, as it does to that of a single judge, and orders judgment to be entered upon it in the same manner. *Currie v. Cowles*, 7 Rob. 3; *McMahon v. Allen*, 27 Barb. 335; S. C., 7 Abb. 1; Code, § 272; *Heinemann v. Waterbury*, 5 Bosw. 686. Formerly it was the duty of the clerk to enter the judgment directed by the decision of the referee as soon as filed. *Ib.*; *Cotes v. Smith*, 29 How. 326. But by the amendment of section 267 of the Code in 1870 the clerk is required to delay the entry of judgment until four days have elapsed since the filing of the report. Any further delay on the part of the clerk in performing this duty will not operate to the prejudice of the prevailing party. *Buller v. Lee*, 33 How. 251; S. C., 3 Keyes, 70.

Upon the expiration of the four days immediately following the filing of the report the clerk must proceed to enter up the judgment directed by the decision of the referee. Code, §§ 267, 272. The entry of the judgment will precede the adjustment of costs, and blanks will be left for the insertion of the costs in the judgment when taxed. *Cotes v. Smith*, 29 How. 326; S. C. affirmed, 31 id. 146; *Stimson v. Huggins*, 16 Barb. 658; S. C., 9 How. 86; *Gilmartin v. Smith*, 4 Sandf. 684.

If the prevailing party fails to furnish the judgment roll, the clerk should collect from the files the necessary papers, and attach thereto a copy of the judgment. *Heinemann v. Waterbury*, 5 Bosw. 686.

Judgment cannot, however, be entered on the report of the referee until all the issues raised in the cause have been disposed of. *McMahon v. Allen*, 27 Barb. 335; S. C., 7 Abb. 1.

Thus, when a referee makes a report, finding the issues raised in the cause in favor of the plaintiff, and reporting also that

before final judgment can be entered an accounting must be had, a judgment cannot be entered regularly before the accounting and report thereon. *Ib.* See Judgment.

Section 8. Reviewing report.

a. In general. The only mode of reviewing a judgment entered upon the report of a referee appointed to hear and decide the whole issue is by appeal. Code, §§ 268, 272; *Dana v. Howe*, 13 N. Y. (3 Kern.) 306. The court has no authority at special term, on motion, to review and set aside as erroneous, a judgment ordered by a referee. *Ib.* But a report of a referee upon a reference to settle claims against executors or administrators may be reviewed either by an appeal directly from the judgment to the general term or by a motion at special term for a new trial by way of opposing the motion to confirm the report. *Coe v. Coe*, 37 Barb. 232; S. C., 14 Abb. 86.

But if it appears that the report of a referee upon questions of fact has been, even in the slightest degree, affected by any influence exercised by the successful party, it may be set aside for irregularity. *Dorlon v. Lewis*, 9 How. 1; *Roosa v. Sauger-ties & Woodstock Turnpike Road Co.*, 12 How. 297; *Gray v. Fisk*, 42 How. 135; 12 Abb. N. S. 213. This is rather a review of the proceedings of the referee, than of his report.

b. By appeal. The Code provides that the report of a referee upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. It also provides that the referee in his report must state separately the facts found and the conclusions of law; and that his decision must be given and may be excepted to and reviewed in the same manner and with the same effect in all respects as on an appeal under section 268 of the Code. Code, § 272. The Code contains, also, the following provisions: An appeal upon the law may be taken to the general term from a judgment entered upon the report of referees, or the direction of a single judge of the same court, in all cases, and upon the fact when the trial is by the court or referees. Code, § 348. See, also, §§ 267, 268. Upon an appeal from a judgment, when the trial has been by the court, the questions of law or fact, or both, may be reviewed by the general term. The review is in the same manner, when it embraces questions of law and fact and the appeal to the general term is from a judgment entered upon a trial by referees. Code, § 272. If

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a party desires a review upon the evidence appearing on the trial, either of the questions of fact or of law, he may make a case or exceptions in like manner as upon a trial by jury. Code, § 268. When the trial is by jury, exceptions may be taken and stated in a case, or separately, with so much of the evidence as may be material to the questions to be raised. Code, § 264.

The party desiring to appeal from the decision of a referee may deem that injustice has been done him in one or more particulars. Thus, he may consider, 1st. That he has been prejudiced by improper rulings made on the trial either as to the admission or rejection of evidence; 2d. That requests to find whether certain facts did or did not exist have been denied or disregarded; 3d. That the facts found, or some of them, were entirely unsupported by evidence; 4th. That the facts found were contrary to evidence; or, 5th, that the referee erred in the conclusions of law drawn from the facts found.

The preliminaries to an appeal on any of the above grounds have already been noticed. If the referee has made improper rulings on the hearing in regard to the admission or rejection of evidence, and exceptions thereto have been duly taken at the time, the party desiring to perfect his appeal should next proceed to put these exceptions in the form required by the rules of court, on appeals to the general term. The exceptions which have been taken on the trial are preserved in the minutes of the counsel and referee, and must be settled in the manner prescribed by the rules of court. The first step will be to make a case containing the exceptions taken on the trial, and so much of the evidence as may be necessary to present the questions for review. Rules 41, 43, Sup. Ct. A copy of this case and exceptions must next be served on the opposite party within ten days after written notice of the filing of the referee's report; and the parties served may, within ten days thereafter, propose amendments thereto, and serve a copy on the party proposing the case and exceptions, who should then, within the next four days, serve the opposite party with a notice that the case and exceptions, with the proposed amendments, will be submitted at a time and place specified, to the referee before whom the cause was tried, for settlement. The time for settling the case, as specified in the notice, must be not less than four nor more than twenty days after the service of the notice. Rule 42, Sup. Ct. The party proposing the case and exceptions

should then mark upon the several amendments his allowance or disallowance of them before they are submitted to the referee for settlement. Rule 43, Sup. Ct.

The referee will thereupon settle the case according to the facts. Rule 41, Sup. Ct. The power to settle a case or exceptions is conferred upon the referee by section 272 of the Code. If the cause was tried before more than one referee all must be present at the settlement. A settlement of a case or exceptions before two of three referees will be irregular. *Fielden v. Lahens*, 14 Abb. 48. See *Townsend v. Glen's Falls Insurance Co.*, 10 Abb. N. S. 277.

The case and exceptions, as settled, must be filed within ten days after the settlement, unless the time has been extended, or the case will be deemed abandoned. Rule 44, Sup. Ct. If no amendments are proposed the referee has only to settle the case as made. Amendments should be written on the case served, or on a separate paper containing a distinct reference to the page and line of the original case proposed to be amended. *Stuart v. Binsse*, 3 Bosw. 657.

The original case or exceptions and the amendments as they came from the referee, with the corrections or allowances as made by him, must be filed, and not a copy of the case as settled. *Parker v. Link*, 26 How. 375. During the ten days immediately following the settlement, and before filing the original, the party should make a copy of the case or exceptions, as settled, to serve upon the opposite party, eight days before the time of noticing for argument, as required by rule 49 of the supreme court. It is also in accordance with the correct practice to file with the original, a transcript or copy of the case as settled, and to serve upon the opposite party a notice that the case has been filed. *Ib.*

After a case or exceptions has been settled and filed with the clerk, it may be taken *prima facie*, in the further progress of the action, as evidence of the facts therein appearing. *Van Bergen v. Ackles*, 21 How. 314.

The case being thus prepared, settled and filed, the cause is then in a condition to be reviewed at general term, and the moving party has only to file a note of issue with the clerk for the purpose of having the cause placed on the calendar, as required by rule 48, notice the cause for a hearing, and serve and fur-

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nish the necessary papers in the form required by the rules of court. See Rules 46, 49, 50, 52, Sup. Ct.

If the party appealing is dissatisfied with the failure or refusal of the referee to find certain facts which may be necessary to bring up the case properly for review, he should proceed to obtain the omitted findings.

It is to be presumed that the party appealing presented the referee, on the conclusion of the trial, with a written statement, in the alternative form, of the facts which he desired found in his favor, with a request that the referee find upon them in one way or the other. If the referee has neglected or refused to find in his report upon the questions so presented, the party may proceed to obtain such findings upon the settlement of the case. In order to obtain such additional findings, the referee must be requested, by the proposed case and exceptions, specifically to find the fact. See *Tomlinson v. Mayor, etc., of New York*, 44 N. Y. (5 Hand) 601, 607. By an important amendment of rule 41 of the supreme court, the referee is authorized and required, upon the submission of the case and amendments to him for settlement, to correct and settle the case according to the facts, and at the same time to find on such other questions or facts as may be required by either party and be material to the issue. The decision of the general term of the supreme court, to the effect that the request for additional findings must be made before the settlement of the case, was decided before the foregoing amendment of the rules. See *Lefler v. Field*, 50 Barb. 407.

Should the referee refuse to pass upon the questions of fact submitted to him for that purpose, and to find affirmatively or negatively, the party should, as a precautionary measure, take an exception to such refusal, although such exception may not be strictly necessary or available to raise the question for review. See *Grant v. Morse*, 22 N. Y. (8 Smith) 323; *Manley v. Insurance Co. of North America*, 1 Lans. 20; *Priest v. Price*, 3 Keyes, 222; *Lefler v. Field*, 47 N. Y. (2 Sick.) 407; *Ashley v. Marshall*, 29 N. Y. (2 Tiff.) 494; *Brooks v. Van Every*, 3 Keyes, 27.

The party should thereupon move the court at special term, before the argument of the appeal from the judgment, for an order directing the referee, in settling the case, to insert such part of the proposed matter as related to the points or claims alleged to have been actually made upon the trial before him,

and to send the case back to him for further findings, if it should be made to appear that they were necessary to a proper review of the judgment. *Lester v. Field*, 47 N. Y. (2 Sick.) 407; *Van Slyke v. Hyatt*, 46 N. Y. (1 Sick.) 259; *Brainerd v. Dunning*, 30 N. Y. (3 Tiff.) 211; *Snook v. Fries*, 19 Barb. 313; *Rogers v. Beard*, 20 How. 282; *Hulce v. Sherman*, 13 id. 411; *Sharp v. Wright*, 35 Barb. 236; *Lane v. Borst*, 5 Rob. 609. Upon the application for the order, the materiality of the desired findings should be shown to the court. Should the application be denied, the proceedings to obtain further findings can be inserted in the record, and upon an appeal from the judgment the materiality of the findings asked for and refused can be determined at the general term, and in the court of appeals on a review of the whole case. *Van Slyke v. Hyatt*, 46 N. Y. (1 Sick.) 259.

The effect of an attempt to procure additional findings of fact is to defeat the application of the general rule, that where there has been no expressed finding of a referee upon a question of fact, the court will, in reviewing the judgment upon appeal, assume, in support of the judgment, that he did find such further facts in favor of the party recovering as are essential to uphold it. Where the finding of facts does not contain enough to sustain the conclusion of law, and it appears from the case that a request to find upon the material facts not found was refused, otherwise than as found in the report, and that that is silent thereon, this court will not presume, in aid of the judgment, that there was a finding not expressed in terms. *Meyer v. Amidon*, 45 N. Y. (6 Hand) 169. See, also, *Oberlander v. Spiess*, id. 175.

There is a distinction to be observed between the proceedings necessary to obtain additional findings of facts where a trial has been had before the court, and the proceedings necessary to obtain the same result where the trial was before a referee. Where the trial is by a judge of the court, a request to find particular facts is sufficient; and, on his settlement of the case, he will state that such request was made and refused. A motion, at special term, to compel a judge to find one way or the other would not be proper, as the judge trying the cause has the same power as a judge at special term, which is not the case with a referee. See *People v. Church*, 2 Lans. 459; S. C., 57 Barb. 204.

It is always advisable to present to the court or referee a written statement of the findings desired, even if not strictly neces-

sary ; for, if furnished, no question can be raised that the request was not first made upon the trial.

The objection that certain findings of fact in the referee's report are unwarranted by the evidence cannot be raised by an exception to the report. Exceptions to a referee's findings of fact are idle and of no avail, as the remedy is by another mode. The decision of a referee is always open to review in the supreme court, without any exception, and the court will always look into the entire evidence, if the question is raised, to see whether there is evidence tending to prove the facts as found by the referee. No exception is necessary to raise the question. *Lester v. Field*, 50 Barb. 407 ; *Russell v. Duflon*, 4 Lans. 399. A case must be made containing all the testimony, when that is important, and the question is then before the court to consider and determine whether the referee's findings, whether express or implied, are against evidence. *Manley v. Insurance Co. of North America*, 1 Lans. 20. The general rule as to the conclusiveness of a referee's finding on a question of fact, where the evidence is conflicting, has been given, see *ante*, p. 314.

Where a referee, upon conflicting testimony, arrives at a conclusion as to the existence or non-existence of an alleged fact, and incorporates this conclusion in his report, his finding, in this respect, if contrary to evidence, is an error upon a question of fact, and, as has been previously stated, no exception is necessary or proper to raise the question for review in the supreme court. The court of appeals, being a court of law, will not generally review an error as to a question of fact. *Mason v. Lord*, 40 N. Y. (1 Hand) 476.

But a finding of facts should always be based upon evidence ; and where none is given tending to show an affirmative fact, it is contrary to law to find such fact against a party traversing it. Thus, where a referee finds a fact upon which no evidence was given upon the trial, the error is not one of fact, but of law, and may be reviewed in the court of appeals. *Mason v. Lord*, 40 N. Y. (1 Hand) 476 ; *Beck v. Sheldon*, 48 N. Y. (3 Sick.) 365 ; *Putnam v. Hubbell*, 40 N. Y. (3 Hand) 106 ; *Root v. Great Western Railroad Co.*, 45 N. Y. (6 Hand) 524.

If the party appealing is satisfied that no error was committed upon the trial, and that the findings of fact were according to the evidence, yet insists that the referee has erred in his legal conclusions, he must then proceed to serve his exceptions to the

report in the manner prescribed by the first clause of section 268 of the Code.

If the question which the party desires to present for review upon appeal sufficiently appears from the record, without a statement of the evidence, it will be sufficient for the party to draw up his exceptions to the decision, and serve them upon the adverse party within the time prescribed, or such further time as may be allowed for that purpose under section 405 of the Code. See *ante*, p. 317, 318.

But such a case will rarely occur. Generally, it will be found necessary, in order to present intelligibly the questions of law which the party appealing seeks to have reviewed, to make a case containing at least a portion of the evidence.

If any exceptions have been taken while the trial was in progress, these, too, should be inserted in the case. *Tremain v. Rider*, 13 How. 148. These exceptions, although distinct from those taken after judgment, must be inserted in the same case; and the case so made must then be settled in the manner before indicated. *Hunt v. Bloomer*, 12 How. 567; S. C., 13 N. Y. (3 Kern.) 341; *Johnson v. Whitlock*, *id.* 344; S. C., 12 How. 571.

But, notwithstanding a different rule may have been stated in the cases last cited, it is only the matters of evidence contained in the case, and the exceptions taken on the trial, that are subject to amendment and settlement, as the exceptions taken to the report itself are never subject to amendment, by the adverse party.

The principles above stated apply to a report of a referee on all the issues. Exceptions are necessary also in a proceeding under a reference other than that of the whole issue. But where a reference is ordered to report facts, the report has the effect of a special verdict, and the questions arising on the facts thus found may be reviewed upon appeal without exceptions. *Kirby v. Fitzpatrick*, 18 N. Y. (4 Smith) 484; *Swift v. Wylie*, 5 Rob. 680. Yet if, in such case, any question be made depending not on the facts found, but on any error in the proceedings on the trial, or in the determination of the facts, the point must be raised by exceptions. *Marshall v. Smith*, 20 N. Y. (6 Smith) 251.

It may not be amiss to consider, in this connection, the principles upon which judgment will be rendered on the appeal.

As the Code and the rules of court require the referee to state

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the facts found in his report, the general term, in reviewing the evidence and the report, assumes that the referee has stated all the material facts which he found, affirmatively, and as to other questions upon which evidence was given, he was unable to find the facts as claimed by the unsuccessful party, or, in other words, he negatived them. As the case contains the testimony, the question is presented to the court and examined precisely as though the referee had expressly found the fact against the party complaining. The question before the court then will be, is such finding, whether express or implied, against evidence. *Manley v. Insurance Co. of North America*, 1 Lans. 20; *Westcott v. Fargo*, 63 Barb. 349.

The mode of obtaining additional findings of facts has been already pointed out. When a motion has been made for an order requiring the referee to find certain facts omitted from his report, and the order has been denied, the question of the materiality of the omitted finding will then be a matter of review, not only at general term, but in the court of appeals. *Van Slyke v. Hyatt*, 46 N. Y. (1 Sick.) 259.

No finding of fact by the general term is requisite for the purpose of review in the court of appeals. Code, § 268. When the case on appeal has been heard and decided at the general term upon the report of the referee and exceptions, without a case containing the evidence, the decision may be reviewed in like manner on appeal to the court of appeals. If the judgment is reversed at the general term, and a new trial ordered, it will not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal; and in that case, the question whether the judgment should have been reversed either upon questions of fact or of law, will be open to review in the court of appeals. Code, §§ 268, 272. For the purposes of an appeal from a judgment rendered on a report of a referee, it is not necessary to insert at large in the case the findings of fact or conclusions of law of the referee, or the exceptions filed thereto; but if the same appear as part of the judgment roll they may be referred to and used on the argument of the appeal with the same effect as though inserted in the case. Code, § 268.

Form of case and exceptions.

(*Title of cause.*)

This action was commenced on the day of , 18 , by the service of a summons and complaint. The object of the action

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Form of case and exceptions — Setting aside report.

was: (*Here state it concisely.*) The defendant, Z. H., answered the complaint, to which a reply was interposed. The cause was duly referred, by an order of this court, to J. W., as sole referee. On the day of , 18 , the cause was duly brought on for a hearing before said referee, at his office in .

On the said trial the following evidence was introduced: (*Here set out the evidence, with all objections, exceptions, etc.*)

The foregoing is all the evidence which was given on the trial of the action before the referee.

After hearing the arguments of the respective counsel, the referee on the day of , 18 , made his report in writing, of which the following is a copy: (*Here set out a copy of the report.*)

The defendant, Z. H., at the close of the evidence, and on the summing up of the cause, insisted that the complaint should be dismissed, as to him, for the reasons which are stated in the exceptions to the referees' findings, decision, report, etc. The exceptions of the defendant, Z. H., to the report of the referee, and to his decision and findings, and his omissions to find, etc., are as follows:

The defendant, Z. H., excepts to the report of the referee.

1. Because, etc. (*Here set out the exceptions to the report.*)

The judgment entered on the report of the referee is as follows: (*Here set out a copy of the judgment.*)

(*Set out copy of the process, pleadings and notice of appeal.*)

(*Date.*)

(*Signature.*)

(*Address.*)

c. Setting aside report. Upon an appeal from the decision of a referee, if the case contains only the report of the referee, without any of the evidence, the record will present the question whether there was an error of law and nothing else. In such a case, the report of the referee can only be set aside upon the facts contained in it, or, in other words, when it affirmatively finds facts which render its results erroneous. It must show that certain facts exist inconsistent with its conclusions of law. Silence is not sufficient. Every presumption is in favor of the report; and it is assumed to be right and to be founded on proof of every necessary fact. *Tomlinson v. Mayor, etc., of New York*, 44 N. Y. (5 Hand) 601.

There is a wide difference between the power of an appellate court, to set aside a report on an appeal from a judgment entered thereon, and the power of the special term to set aside a report on motion. The court, at special term, have no power to set aside on motion the report of a referee for an error in a conclu-

sion of law. The remedy is by appeal. *Dana v. Howe*, 13 N. Y. (3 Kern.) 306.

Where a report of a referee contains no findings of facts, the party against whom the report is made may waive the irregularity, and, on an appeal from the judgment entered thereon, may obtain the findings of the referee upon the settlement of the case. Or he may apply to the court before the time for excepting has expired, to have the case sent back to the referee, to find specifically upon such questions or to re-settle his report. This is undoubtedly the better practice. *Van Slyke v. Hyatt*, 46 N. Y. (1 Sick.) 259, 265; affirming S. C., 9 Abb. N. S. 58; *Bouton v. Bouton*, 42 How. 11; *Lester v. Field*, 47 N. Y. (2 Sick.) 408; *Wright v. Sanders*, 28 How. 395. But it does not follow that this is the only remedy to which the party may resort. If the report does not contain any findings of facts, the defeated party, unless he chooses to waive the irregularity, is entitled to have the report and judgment set aside, and to require that the referee in the first instance report the facts and conclusions of law found by him. *Wright v. Sanders*, 28 How. 395; *Church v. Erben*, 4 Sandf. 691; *Van Steenburgh v. Hoffman*, 6 id. 492; *Doke v. Peek*, 1 Code R. 54; *Deming v. Post*, id. 121.

So where it appears that the report of a referee, upon questions of fact, has been, even in the slightest degree, affected by any improper influence exercised by the successful party, it will be set aside for irregularity. *Dorlon v. Lewis*, 9 How. 1; *Roosa v. Saugerties & Woodstock Turnpike Road Co.*, 12 How. 297; *Gray v. Fisk*, 12 Abb. N. S. 213; S. C., 42 How. 135.

d. Correction. An error, apparent upon the face of a referee's report, in a matter of mere computation, may be corrected by the court, although no exceptions to the report have been filed. *Bogert v. Furman*, 10 Paige, 496. See *Currie v. Cowles*, 7 Rob. 3.

Any correction of the report by the referee, after it has been duly signed and delivered, is unauthorized, and the matter so inserted will be stricken out on motion. *Shearman v. Justice*, 22 How. 241. An exception to this rule has been noticed in treating of the power and duty of the referee to find additional facts in settling a case, *ante*, 326 to 329.

In several instances the courts have sent the report of a referee back to him for correction, without directing a new trial. This practice has been pursued where the report did not contain a

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proper statement of the findings of fact and law. *Hulce v. Sherman*, 13 How. 411; *Wright v. Sanders*, 28 id. 395. See *Sharp v. Wright*, 35 Barb. 236; *Church v. Erben*, 4 Sandf. 691; *Snook v. Fries*, 19 Barb. 313; *Peck v. Yorks*, 14 How. 416; *Tillman v. Keane*, 1 Abb. N. S. 23.

So where a referee has made a report upon the general issues, and has stated therein that an accounting would be necessary before final judgment, the court has sent back the cause to the referee to take and state the account. *McMahon v. Allen*, 27 Barb. 335; S. C., 7 Abb. 1. See *Pratt v. Stiles*, 17 How. 211; S. C., 9 Abb. 150.

The power of the court at special term to send back a report to a referee, on the ground that it does not pass upon all the issues, has been asserted, and sometimes exercised. *Brown v. N. Y. Central R. R. Co.*, 26 How. 32. See *Union Bank v. Mott*, 13 Abb. 247; *Bouton v. Bouton*, 42 How. 11; *Nelson v. Ingersoll*, 27 id. 1; *Rogers v. Beard*, 20 id. 282.

e. Costs on review. The question of costs on the review of a decision of a referee is a matter within the discretion of the court and not subject to any arbitrary rule. On setting aside the report of a referee as against evidence, and ordering a new trial, the appellate court will usually direct that the costs abide the event. *Wentworth v. Candee*, 17 How. 405.

Section 9. Changing referee.

a. In general. The power of the court to remove a referee appointed by it, at any stage of the action, is undisputed. This power is, however, seldom exercised, and only for good cause shown.

A referee appointed by the court, upon the written consent of the parties, will not be removed upon objections known to the parties at the time of his appointment. *Perry v. Moore*, 2 E. D. Smith, 32; S. C., 3 Code R. 221.

So where, in an action not referable, except on consent of the parties, a trial has been had before a referee selected by the parties, and a judgment entered upon his report has been reversed and a new trial ordered on questions of law, the court will not substitute a new referee without the consent of the parties. *Billings v. Vanderbreck*, 15 How. 295.

But where the judgment entered upon the report of a referee has been reversed, for the reason that the findings of facts are against evidence, the cause will not be sent back for a new trial

Changing referee — Death of a referee.

before the same referee. *Billings v. Vanderbreck*, 15 How. 295; *Sharp v. Mayor, etc., of New York*, 31 Barb. 578; S. C., 19 How. 193; *Schermerhorn v. Van Alen*, 13 id. 82. It is the general practice in such cases to vacate the order of reference, on granting a new trial, on the application of either party, and to refer it to a new referee, if the cause is referable, or to retain it in court if it is not. *Sharp v. Mayor, etc., of New York*, 31 Barb. 578; S. C., 19 How. 193. Whether a referee shall be retained or removed, when a new trial is ordered, is a question within the discretion of the court. *Ib.* If a new referee is appointed, it will be on the same grounds, and for the same reasons, which require a new jury to retry a cause in which a verdict has been had and a new trial ordered. *Murphy v. Winchester*, 35 Barb. 616.

On reversing a judgment entered on a report of a referee for an error in fact, and on granting a new trial, it is, as has been stated, the general practice to vacate the order of reference. This practice is not, however, universal. The order of reference may be allowed to stand, but with leave to either party to apply for the appointment of a new referee. *White v. Smith*, 1 Lans. 469.

In an action for a divorce on the ground of adultery, the fact that the person to whom the cause is referred was referee in a prior action of the same nature between the same parties, and decided in favor of the defendant, will not give the plaintiff a right to insist on the appointment of a new referee, in the absence of any necessary conclusion drawn from the testimony taken or the proceedings had in the former case, either that the referee had a bias in favor of one of the parties, or a prejudice against him, or that his decision in the prior action will be apt to influence his mind in determining the subsequent one. *Clark v. Clark*, 7 Rob. 62.

Any irregularity in the appointment of a referee, which might have been a good ground for his removal, will be waived by the appearance of the parties before him, and proceeding with the reference without objection. *Quinn v. Lloyd*, 7 Rob. 157.

The inability of a referee to proceed with the reference will be a good cause for his removal. *Forrest v. Forrest*, 3 Bosw. 650.

b. Death of referee. Upon the death of two of three referees, the order of reference will be vacated as a matter of course.

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Death of parties — Actions against referees.

Emmet v. Bowers, 23 How. 300. But, upon the death of one of three referees, after the cause has been tried and a report made, the survivors may settle the case on an appeal from the judgment entered on the report. *Westbrook v. Dubois*, 3 How. 26.

Upon the death of a sole referee, after the cause has been tried and the report signed, the successful party may proceed to enter judgment on the report in the same manner as if the referee were still living. If the unsuccessful party has obtained an order to refer the cause back to the referee to amend his report, such order will be vacated. In such cases the death of the referee is a misfortune which the unsuccessful party must bear, and all the consequences resulting from it. *Julian v. Grant*, 34 How. 132. The unsuccessful party may bring an appeal from the judgment entered upon the report of the referee, and obtain additional time to make a case and exceptions with a stay of proceedings. The case and exceptions should be settled by one of the justices of the court, on hearing the attorney or counsel who tried the cause. *Ib.* Should the judgment be reversed on the appeal, the cause must then be retried before another referee or a jury.

The death of the referee before the signing of the report would, of course, put an end to the reference.

c. Death of parties. Where, pending a reference, one of the plaintiffs dies, and his successor in interest is substituted, the reference is not superseded nor the prior proceedings invalidated. Upon the allowance of the order continuing the action in the name of the successor in interest, the proceedings will continue from the point at which they were interrupted by the death of the party. *Moore v. Hamilton*, 48 Barb. 120; S. C. affirmed, 44 N. Y. (5 Hand) 666. Vol. 1, p. 158.

The death of a sole plaintiff, after the report of a referee in favor of the defendant, will not prevent the entry of judgment against him on the report. *Scranton v. Baxter*, 3 Sandf. 660; S. C., 1 Code R. N. S. 88. But an action of ejectment against a sole defendant, who dies before the report of the referee is signed, abates absolutely, and no judgment upon such report can be entered *nunc pro tunc*, as such report is null and void. *Kissam v. Hamilton*, 20 How. 369. Vol. 1, p. 153.

Section 10. Actions against referees.

a. In general. Where a referee, appointed by the court to perform certain duties, and in the performance thereof receives

Actions against referees.

certain moneys, no action can be brought against him to recover the same without the permission of the court. In such cases he is an officer of the court, and the moneys in his hands are considered as in the custody of the court, and the rules which apply to actions against receivers apply to actions against him. *Higgins v. Wright*, 43 Barb. 461. Vol. 1, p. 200, *f*.

CHAPTER VI.

INTERLOCUTORY OR DECRETAL ORDERS.

ARTICLE I.

ORDER RESERVING FURTHER DIRECTIONS AND REFERENCE THEREON.

Section 1. In what cases order is made.

a. In general. Under the former practice in chancery, a clear and well-defined line of distinction was preserved between *final* decrees of the court, and decrees merely *interlocutory*. If all the questions arising out of a controversy between the parties were heard and determined, and nothing remained to be done but to carry the decision of the court into effect, then the decree was final; but, if any matter of law or fact was left to be ascertained, the ultimate determination of which might affect the right of the parties, the decree was merely interlocutory. *Kane v. Whittick*, 8 Wend. 219, 224; *Travis v. Waters*, 12 John's. 500; *Jaques v. The Methodist Church*, 17 id. 549, 558; *Mills v. Hoag*, 7 Paige, 18; *Smith v. Lewis*, 1 Daly, 452. See *Loring v. Illsley*, 1 Cal. 27; *Chouteau v. Rice*, 1 Minn. 24.

The same distinction between final and interlocutory decrees or judgments still necessarily exists, and is constantly recognized in actions for equitable relief under the Code, though not expressly stated in the terms of that instrument itself. Thus: On a trial by the court without a jury, the decision may be final, that is, all the questions involved in the controversy may be determined, and final judgment be entered thereon without further proceedings; or, it may be merely interlocutory, ascertaining the rights of the parties, and directing a reference for the purpose of taking and stating an account, or determining some other fact or material circumstance, and reserving further directions until the coming in and confirmation of the report. *Williamson v. Field*, 2 Barb. Ch. 281; *Cruger v. Douglass*, 2 N. Y. (2 Comst.) 571; S. C., 4 How. 215; *Harris v. Clark*, id. 78.

In the latter case the decision of the court, and the order entered upon it directing a reference, is regarded under the present practice as corresponding precisely with the interlocutory decree of the court of chancery, the effect in either case being

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the same, namely, to suspend the final decree or judgment until, by the report of the referee or the verdict of the jury, all the circumstances and facts material and necessary to a full understanding of the matters in litigation are brought before the court, thereby enabling the court to determine finally upon the rights of the parties, according to equity and good conscience. *Kane v. Whittick*, 8 Wend. 219; *Tompkins v. Hyatt*, 19 N. Y. (5 Smith) 534; *Smith v. Lewis*, 1 Daly, 452.

The reasons for withholding or suspending the final decree or judgment in the first instance are most frequently founded in the necessity which exists, to make inquiries, or to take accounts, or sell estates, and adjust other matters which must necessarily be disposed of, before a final decision upon the subject-matter of the suit can be rendered (2 Dan. Ch. Pr. 987); and in all such cases where a reference has been directed for the purpose of ascertaining any material fact in the case, the decree has been held to be interlocutory and not final. *Jaques v. Trustees of M. E. Church*, 17 Johns. 548; *Clark v. Brooks*, 2 Abb. N. S. 385; S. C., 2 Daly, 159; *Morris v. Morange*, 38 N. Y. (11 Tiff.) 172; S. C., 6 Trans. App. 1; 4 Abb. N. S. 447; *Dows v. Congden*, 28 N. Y. (1 Tiff.) 122; *Tompkins v. Hyatt*, 19 N. Y. (5 Smith) 534; *Lawrence v. Farmers' Loan & Trust Co.*, 15 How. 57; S. C., 6 Duer, 689; *Belmont v. Ponvert*, 3 Rob. 693. See *Travis v. Waters*, 12 Johns. 500.

The cases in which an interlocutory or decretal order, directing a reference, is authorized under the present practice, are embraced within the second and third subdivisions of section 271 of the Code. Subdivision 2 authorizes a reference "where the taking of an account shall be necessary for the information of the court before judgment, or for carrying a judgment or order into effect;" and, by subdivision 3, a reference is authorized "where a question of fact other than upon the pleadings shall arise, upon motion or otherwise, in any stage of the action."

A reference, when ordered by the court in the course of a suit, for any of the purposes indicated above, is viewed in precisely the same light as an interlocutory decree or order of a court of equity. *Hollister Bank of Buffalo v. Vail*, 15 N. Y. (1 Smith) 593; *McMahon v. Allen*, 27 Barb. 335; S. C., 7 Abb. 1; *Tompkins v. Hyatt*, 19 N. Y. (5 Smith) 534; and the referee, being a mere substitute for a master in chancery, must conform to the

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former chancery practice. *Palmer v. Palmer*, 13 How. 363; *Cameron v. Freeman*, 10 Abb. 333; S. C., 18 How. 310.

And, since the Code has made no other provisions on the subject, the proceedings generally, on interlocutory orders, must be conducted in accordance with the rules of the old court of chancery. *Wiggin v. Gans*, 4 Sandf. 646; *Ketchum v. Clark*, 22 Barb. 319; *Elmore v. Thomas*, 7 Abb. 70; *Smith v. Lewis*, 1 Daly, 452; Code, § 469; Sup. Ct., Rule 97.

b. Reference to make inquiries. Among the numerous cases in which the court will direct a reference to make inquiries before final judgment are those relating to the title of the vendor in suits for the specific performance of contracts to convey real estate; and, in suits of this nature, generally, it is a rule of the court not to make any decree whatever until certain preliminary inquiries have been made. Thus, as a general rule, the court will not permit the question, whether a good title can be made or not, to be argued before it in the first instance, even though the objections to the title are stated, and the questions arising upon them are properly raised by the pleadings. *Jenkins v. Hiles*, 6 Ves. 646; 2 Dan. Ch. Pr. 988. A purchaser may, however, preclude himself, from his right to such an inquiry by his manner of pleading (*Jenkins v. Hiles, supra*), or by agreement (*Duke v. Barnett*, 2 Coll. 337; S. C., 10 Jur. 87), or by acts *in pais*, such as taking possession of the estate or exercising acts of ownership over it (*Fleetwood v. Green*, 15 Ves. 594; *Margravine of Anspach v. Noel*, 1 Mad. 310); but such acts will not deprive the purchaser of his right to investigate the title, unless the court is satisfied from them that he intended to waive and has actually waived it. *Burroughs v. Oakley*, 3 Swanst. 159.

The terms in which a reference is directed by an interlocutory decree, to inquire into the title of a vendor, is framed, not to inquire whether he could make a good title at the time of entering into the contract, but whether he can, at the time of the reference, make a good title (*Lungford v. Pitt*, 2 P. Wms. 629; *Mortlock v. Buller*, 10 Ves. 292; *Baldwin v. Salter*, 8 Paige, 472; but, see *Richmond v. Gray*, 3 Allen [Mass.], 25); and it has been held, that if the vendor can show a good title at any time before the result of the inquiry into the title has been certified by the officer of the court, it will entitle him to a decree (*Hepburn v. Dunlap*, 1 Wheat. 179; *Mortlock v. Buller*, 10 Ves. 292; *Seymour v. Delancy*, 3 Cow. 445); or, if the vendor can satisfy the

Reference to make inquiries — To take proofs.

court that he can make a good title by clearing up the objections, even after the result of the inquiry has been certified, a decree will be made in his favor. *Paton v. Rogers*, 6 Mad. 256.

An order for a reference of this nature should contain a declaration that the contract ought to be specifically performed. *Mole v. Smith*, Jacob, 490; 1 Barb. Ch. Pr. 328.

A reference is sometimes directed by the court for the purpose of making inquiries as to what persons are interested in the subject-matter of the suit. Thus, in all cases relating to the distribution of the estate of an intestate, the court will, before it makes any decree affecting the estate, or even ordering an account of it to be taken, direct a reference to inquire and report who were the next of kin of the intestate at the time of his decease, and whether any of them have since died, and, if dead, who are their legal personal representatives. 2 Dan. Ch. Pr. 991.

There are other cases, also, in which there is a fund distributable among persons constituting a particular class consisting of numerous individuals, as in the case of a bequest to the cousins of a testator, etc., where the court will, before it directs any steps to be taken, either toward a distribution or for ascertaining the amount of the fund, satisfy itself by a previous reference, that all the individuals constituting the class among whom the fund is distributable are parties to the proceeding. 2 Dan. Ch. Pr. 991; 1 Barb. Ch. Pr. 328. And the same course of proceeding is pursued, where the property is distributable between one of the two or more classes of individuals. *Ib.*

Another instance of an interlocutory order for a reference to make inquiries is given in a case where it being necessary to ascertain a particular description of the plaintiff's real estate, in order that a judgment for defendant might be made a specific lien upon it, this inquiry, which was not embraced in the issues, was referred to a referee preparatory to final judgment. *Elmore v. Thomas*, 7 Abb. 70; 1 Van Sant. Eq. Pr. 516.

c. To take proofs. Under an interlocutory order for a reference to take proofs, the referee must take all the evidence that is offered without regard to its competency, and report it with his opinion, leaving the court to decide, on the hearing of the matter, what is or is not competent. *Scott v. Williams*, 14 Abb. 70; S. C., 23 How. 393. And, in such case, the referee has no power to receive an affidavit as evidence. He must require the witness

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To take accounts, make computations, hear claims, etc.

to be sworn before him. *Security Fire Insurance Co. v. Martin*, 15 Abb. 479.

The authority of a referee over questions of an interlocutory nature which have arisen during the trial, ceases after he has rendered his decision and made his report. *Allen v. Way*, 7 Barb. 585; S. C., 3 Code R. 243.

d. To take accounts, make computations, etc. An interlocutory order for a reference to take accounts and make computations, is usually made in all cases where the action is brought for the purpose of obtaining a general accounting. Thus, an order of this nature will be made in an action brought by legatees against an executor for the purpose of compelling him to render an account, and to obtain from him payment of legacies; or, in an action brought by a creditor against an assignee for a similar purpose; or a *cestui que trust* against any other trustee; or by one partner against his copartner for the winding up of the affairs of the partnership. *Graham v. Golding*, 7 How. 260; And, in like manner, a reference will be ordered for a computation of the amount due preparatory to entering final judgment, in an action for the foreclosure of a mortgage, after the decision of the issues declaring the plaintiff's rights on his bond and mortgage. *Hollister Bank of Buffalo v. Vail*, 15 N.Y. (1 Smith) 593; *Johnson v. Everett*, 9 Paige, 636.

So in an action brought by preferred creditors, under a copartnership, against the assignees and others, to obtain a general accounting, including the proceeds of certain real estate sought to be charged as copartnership property, in a case in which the cause was tried and an interlocutory decision made, charging the value of the improvements to the real estate as copartnership assets, and ordering a reference to compute such value and take an account. *Kendall v. Rider*, 35 Barb. 100; 1 Van Sant. Eq. Pr. 514. So in an action brought by the assignee himself to settle certain equities between the creditors under the assignment, and to render a final account, and obtain his discharge, on an interlocutory decision upon the issues, a reference to take the account was ordered. *Van Santvoord v. Floyd* (Rensselaer special term, December, 1858, not reported). Cited in 1 Van Sant. Eq. Pr. 514.

e. To hear claims. An interlocutory order for a reference under this head is necessary for the purpose of the distribution of a fund among creditors, or the surplus thereof; a familiar

Form of creditors' claim before referee to surplus moneys on a mortgage sale.

illustration of which is given in the case of claims to surplus moneys arising on a foreclosure sale; and a reference of this nature may be directed either before or subsequent to final judgment, or as consequent thereon. In actions brought by creditors the order usually directs such creditors to come in before the referee and establish their claims. The creditor so coming in is required to present the particulars of his claim in writing, supported by an affidavit that the amount claimed is justly due, and that neither he, nor any other person for his use, has received the amount claimed, or any part thereof, or any security or satisfaction therefor. *Morris v. Mowatt*, 4 Paige, 142. The object of this affidavit is not to prove the claim, but merely to guard against fictitious claims, which the parties themselves know to be unfounded in justice; and if the claim presented is contested by any person having a right to contest the same, it must be supported by legal proof. *Morris v. Mowatt*, 4 Paige, 142; *Fladong v. Winter*, 19 Ves. 199.

*Form of creditors' claim before referee to surplus moneys on a mortgage sale.**(Title of cause.)*

The claim of A. G., a specialty creditor of W. M., the defendant in this suit, to the surplus moneys arising from the sale of the mortgaged premises, under the judgment in this action.

The said A. G. states that he resides at Johnstown, in the county of Fulton, and that he has a lien upon the said surplus moneys by virtue of a judgment recovered against the mortgagor, W. M., in the supreme court, for the sum of \$, on the day of , 18 , and while he, the said W. M., was the owner of the equity of redemption in the mortgaged premises and before the commencement of this suit; which lien is next in priority after the mortgage of the complainant; and the whole amount of which judgment is still due and unpaid.

And he, therefore, claims the whole of said surplus moneys arising from the sale of the mortgaged premises, which, after paying the amount of the complainant's debt and costs, amounts to the sum of \$.

A. G.

(Dated, etc.)

To E. B., Esq., Referee.

FULTON COUNTY, ss.:

A. G., the above claimant, being duly sworn, says that the facts set forth in the above claim are true; that the amount therein claimed as being due to him upon the judgment therein mentioned, is justly due; and that neither he, nor any person

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Form of creditors claim before referee, etc.—To sell estates.

by his order, or to his knowledge or belief, for his use, has received the amount thus claimed, or any part thereof, nor any security or satisfaction whatever for the same or any part thereof, other than the said judgment.

A. G.

Sworn before me, this day }
of , 18 }

E. B., *Referee*.

A complainant in a creditor's suit will be required to prove his debt under the decree. So under a decree directing an account of the estate of the complainant's testator, and of his debts, etc., and that the creditors come in and prove their debts, the complainant may come in and prove his debt, and be examined respecting it. 1 Barb. Ch. Pr. 522. Witnesses may be examined either in support of or against the claim; but in supporting charges, it seems, the strict rules of evidence, by mutual understanding, are frequently dispensed with; and that bonds, deeds, notes and other securities are almost invariably proved by affidavit, recourse being had to the examination of witnesses only in very closely contested cases, or where fraud is suspected. 2 Dan. Ch. Pr. 1210; 1 Barb. Ch. Pr. 522. Where a person, not a party to the suit, presents a claim, the party representing the estate on which the claim is made has a right to the benefit of any defense which he could have made to a bill filed by the claimant, or to an action at law, brought to establish such claim. The statute of limitations may, therefore, be set up in bar of the claim, provided such claim was within the operation of the statute, before the decree was pronounced. *Ib.* So, also, if it is objected that a person is not a creditor for a valuable consideration, that question may be entered into on the reference. *Peacock v. Monk*, 1 Ves. Sr. 127-131.

Exceptions may be taken to the referee's report in the same manner as exceptions are taken in other cases; but this mode of objecting applies only to those cases in which the claim has been taken into consideration. If the referee refuses, for any reason, to entertain the claim at all, the proper course seems to be to apply to the court by motion or petition. 2 Dan. Ch. Pr. 1212; *Paynter v. Houston*, 3 Mer. 297.

f. To sell estates. Though interlocutory references are often directed for this purpose, it must be constantly borne in mind, that an order is not *interlocutory* merely because it directs a reference. Thus, a decree or order may be final, and not inter-

locutory, although it directs a reference; if all the consequential directions depending upon the result of the referee's report are contained in the decree, so that no further decree or order of the court will be necessary upon the confirmation of the report, to give the parties the full and entire benefit of the previous decision of the court. *Mills v. Hoag*, 7 Paige, 18; *Quackenbush v. Leonard*, 10 id. 131; *Morris v. Morange*, 38 N. Y. (11 Tiff.) 172; S. C., 6 Trans. App. 1. But, on the other hand, no judgment or decree can be considered as final which expressly reserves any question whatever for future consideration and determination by the court. *Belmont v. Ponvert*, 3 Rob. 693; *Butler v. Lee*, 38 How. 251; S. C., 3 Keyes, 70. Thus, it has been held, that a judgment for the sale of lands and the disposition of the proceeds, in accordance with the report to be made upon a reference therein ordered to ascertain the shares of the respective parties, is merely interlocutory, and no appeal can be taken from it to the court of appeals, even though it do not contain a provision for a review of the report, or for suspending the actual payment of the money to give an opportunity for an appeal. *Tompkins v. Hyatt*, 19 N. Y. (5 Smith) 534. And a decree or judgment empowering an executor to sell the lands of his testator for the payment of the debts of the estate, and to report his proceedings in execution thereof to the court, is not final, but interlocutory. *Goodwin v. Miller*, 2 Munf. (Va.) 42.

g. In divorce actions. Interlocutory references are frequently directed, in actions for absolute or limited divorces, for the purpose of making inquiries into and taking proofs of all the material facts charged in the complaint. Thus, where a divorce is sought on the ground of adultery, a reference of this nature may be ordered under the 87th rule of the court, or where an action is brought to annul a marriage, on the ground that the party was under the age of legal consent, or a lunatic, or that the plaintiff's consent was obtained by force or fraud, a reference may be ordered under rule 88. A reference may also be ordered to take proof of the facts charged in a complaint for a separation, or limited divorce, under the 89th rule; or to inquire into the question of the legitimacy of children on complaint of a husband for divorce, pursuant to the 91st rule; also, a reference to inquire and ascertain the amount which should be allowed a wife as alimony for the support of herself and children, etc.

References under this head proceed substantially in the same

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Form of interlocutory order of reference under 87th rule — In partition.

general manner as other references of the class under consideration. Witnesses are summoned, the parties notified, testimony taken, and the referee's report made, filed and excepted to, in like manner. If the report is found insufficient, the court may order it to be recommitted to the referee to take further proof. *Arborgast v. Arborgast*, 8 How. 297; *Zorkowski v. Zorkowski*, 27 id. 37; S. C., 3 Rob. 613. See Divorce.

Form of interlocutory order of reference under 87th rule.

(*Title of cause.*)

(*At a special term, etc.*)

On reading and filing proof of due service of summons more than twenty days since, and that the defendant has failed to answer within the time required by law (or has put in his [*or her*] answer, which does not deny the facts charged in the complaint in this action, and on proof of due service of notice of motion on defendant's attorney), and, on motion of H. E. S., counsel for the plaintiff, it is ordered that it be referred to A. B., of, etc., as referee, to take proof of all the material facts charged in the complaint, and report thereon, with the proofs so taken by him, to the court, with all convenient speed.

(If the legitimacy of children be questioned in the complaint, add:) And that said referee also take proofs upon the question of the legitimacy of E. G., one of the children of the said defendant, as well as upon the other matters stated in the complaint, and also report with his opinion thereon, and the proofs so taken by him, with all convenient speed.

h. In partition. The court having ascertained the rights and interests of the respective parties in an action for the partition of real estate, an interlocutory or decretal order may be made for its apportionment or partition, preparatory to a final judgment or decree declaring such partition final and effectual between the parties.

In this case, however, the reference is not ordered before a single referee, as is usually done in other cases of interlocutory references; but, by the provisions of the Revised Statutes (which are made applicable to actions for the partition of lands, by section 448 of the Code), the order directing the reference appoints three reputable freeholders *commissioners* to make the partition so adjudged, according to the respective rights and interests of the parties as the same were ascertained and determined by the court. 2 R. S. 321 (331), § 25. See Partition.

In case of the death, resignation, or neglect to serve, of the

persons thus appointed, or either of them, the court is empowered under the statute to appoint others in their places, from time to time, as may be necessary. *Id.*, § 26.

The subsequent sections of the statute prescribe the manner in which the commissioners shall proceed in such cases, and, after completing the partition and division of the real estate, they are required to make a full report of their proceedings, "under the hands of any two of them, specifying therein the manner of executing their trust, and describing the land divided and the shares allotted to each party, with the quantity, courses and distances of each share, and a description of the posts, stones or other monuments thereof, and the items of their charges." *Id.* 322 (331), § 30.

The proceedings and the report made thereon are in all respects similar to the proceedings by a referee upon an interlocutory order. The report must be filed in the office of the clerk of the court (*Id.* 322 [331], § 33), and the cause is brought to a hearing upon it, and a final judgment rendered similar to the former final decree in chancery, that the partition made by the commissioners be firm and effectual forever. 2 R. S. 322 (332), § 35. The report of the commissioners is not liable to be excepted to, under the provisions of the 39th rule of the court, relating to the reports of referees; but, if any party is dissatisfied, the report, on good cause shown, may be set aside by the court and new commissioners be appointed as often as may be necessary; or the report may be amended in respect to any mere formal inaccuracy. 2 R. S. 322 (332), § 34; 2 Barb. Ch. Pr. 301. See *Double-day v. Newton*, 9 How. 71.

i. In foreclosure. If, in a suit for the foreclosure of a mortgage, a decree is made which merely decides or declares the rights of the complainant by virtue of his bond and mortgage, and directs a reference to compute and ascertain the amount due to him, reserving all questions and directions until the coming in and confirmation of the report of the referee, it is an interlocutory decree merely, and the complainant cannot obtain the benefit of his suit until he brings the cause on to be heard again upon the equity reserved, and for further directions as to a sale of the mortgaged premises and the payment of his debt and costs out of the proceeds of such sale. *Johnson v. Everett*, 9 Paige, 636. But if a judgment or decree in such an action directs the sale of the premises for the satisfaction of the debt, and that the de-

fendant pay any deficiency appearing after such sale, the judgment or decree is final, and not interlocutory merely, as it leaves nothing further to be adjudicated or reviewed by the court. *Morris v. Morange*, 38 N. Y. (11 Tiff.) 172; S. C., 6 Trans. App. 1; 4 Abb. N. S. 447. See *Bolles v. Duff*, 43 N. Y. (4 Hand) 469; S. C., 41 How. 355; 10 Abb. N. S. 399.

Claim to surplus money, on a foreclosure sale, is a proceeding subsequent to final judgment, and is had after the filing of the report of sale. The practice is regulated by rule 77 of the supreme court, and is similar to the former chancery practice, as prescribed by the provisions of the 136th chancery rule, as amended by the chancellor in 1840. See *post*, 368, art. 4, § 1 *g*.

j. Order upon interlocutory decision. The hearing of a cause in the first instance, and the examination and determination of the issues between the parties by interlocutory decisions, is regarded as a trial, within the meaning of the Code, requiring a written decision of the judge to be made and filed. The decision itself is not an order, but should properly contain all the elements on which an order directing the reference or other proceeding may be founded. The order entered upon the decision forms the basis of the subsequent proceedings before the referee. The proper practice to be pursued in such cases is as follows: On filing the written decision of the judge, to draw and enter an order, in the form of the former interlocutory or decretal order, following the terms of the decision, and appointing and naming the referee and specifying and directing the subject of the reference. 1 Van Sant. Eq. Pr. 520. See *Kendall v. Rider*, 35 Barb. 100. If the judge's decision merely directs a reference, without specifying the name of the referee, such referee, unless agreed upon by the party, is to be selected or appointed in the same manner as in other cases of reference. From an order directing a reference there can be no appeal on the merits, either upon the questions of law or of fact. *Lawrence v. Farmers' Loan and Trust Co.*, 15 How. 57; S. C., 6 Duer, 689; *D'Ivernois v. Leavitt*, 8 Abb. 59; *McMahon v. Allen*, 7 id. 1; S. C., 27 Barb. 335; *Lawrence v. Fowler*, 20 How. 407. But an appeal might, perhaps, be allowed on the ground that the matter referred was not referable, or in respect to the direction given for such reference. See *Wiggin v. Gans*, 4 Sandf. 646.

If a party considers himself aggrieved, by an interlocutory decision of the court on a trial without a jury, he must wait

Proceedings upon the reference — Who appointed referees — General powers, etc.

until the referee shall have reported, and final judgment has been entered before making his exceptions. He may then take his exceptions and appeal from the judgment to the general term, and if he choose, from the general term decision to the court of appeals. 1 Van Sant. Eq. Pr. 521; *McMahon v. Allen*, 7 Abb. 1; S. C., 27 Barb. 335.

ARTICLE II.

PROCEEDINGS ON THE REFERENCE.

Section 1. How to proceed.

a. In general. In the present article it is proposed to treat of the proceedings on interlocutory references generally; and subsequently to notice the manner of proceeding, respectively, on: 1. References to take accounts; 2. To make inquiries; 3. To sell estates or adjust matters before final judgment. The duties of the officer before whom a reference is directed are various, and extremely difficult to specify, on account of the great variety existing in the questions of law or fact which he may be called upon to decide, or respecting which he may be required to report his opinion to the court.

b. How made. Under the practice formerly existing, references of this nature were, in all cases, made to a master in chancery; who was required to *reside* in the county for which he was appointed; but he might act as master in any county of the State. The office of master in chancery was abolished by the constitution of 1846, and it was provided by the judiciary act of 1847, that the functions of such officer were thereafter to be discharged by a person appointed by the court to act as referee in each particular case.

c. Who appointed referee. Any indifferent person, not a party to the suit, and agreed upon by the parties, or nominated by the court, may act as such referee; though choice is usually made of an attorney or counselor at law, or of the clerk of the court.

d. General powers and duties. The general powers and duties of referees on interlocutory or decretal orders are not prescribed by the Code, or by the rules of the court, and being the same as were formerly possessed and exercised by a master in chancery, the referee must conform to the rules and former practice of the court of chancery so far as they are applicable under the Code.

Change of referee — Fixing time and place of hearing.

Palmer v. Palmer, 13 How. 363; *Ketchum v. Clark*, 22 Barb. 319; *Graves v. Blanchard*, 4 How. 303; *Van Zant v. Cobb*, 10 id. 348.

Section 272 of the Code has reference only to the trial of issues before referees; and the provisions of that section, as to the powers of referees to punish for contempts, etc., and to amend the pleadings and summons, are not applicable to mere interlocutory references. *McCrackan v. Valentine*, 9 N. Y. (5 Seld.) 42. As a general rule, the facts and issues established by the interlocutory decision and order are to be taken as conclusive by the referee, for the purposes of the reference. *Ib.*; 1 Van Sant. Eq. Pr. 523.

e. Change of referee. A matter once referred cannot be withdrawn from the referee named without an order of the court; and such an order will not be made unless on very special occasions, such as the incapacity of the referee from illness, to attend to the business, or other cause of an urgent nature sufficient to justify a removal. 2 Dan. Eq. Pr. 1168; 1 Van Sant. Eq. Pr. 524. Unreasonable delay on the part of the referee in proceeding with the reference, or granting an adjournment for an unreasonable length of time against the wish of one of the parties, has been considered good cause for substituting another referee with directions to proceed with the reference. *Forrest v. Forrest*, 3 Bosw. 650.

f. Fixing time and place of hearing. It is the usual and proper practice for the referee to appoint in writing a time and place for the hearing of the cause, a copy of which should be served with or before the notice of hearing. *Sage v. Mosher*, 17 How. 367. See *Stephens v. Strong*, 8 id. 339. And the same thing was required to be done by the rules of the old court of chancery. Chancery, Rule 100.

Under the former practice, it was held irregular for the master to issue a summons to proceed with the reference until the decretal order was actually entered and an authenticated copy brought into his office (*Quackenbush v. Leonard*, 10 Paige, 131); but the actual service of a copy of the order, however, is now frequently omitted in practice until the hearing. This practice is, however, erroneous. No referee should proceed a step in the exercise of his duties without a certified copy of the rule or order appointing him. *Bonner v. McPhail*, 31 Barb. 106.

The time fixed for the reference is usually sufficient to enable

Parties, how brought before referee.

the party prosecuting the reference to give the ordinary notice of eight days, unless the adverse party is brought before the referee by summons, in which case it may be a shorter time. By the rules of the former practice, the time fixed could not have been less than two days, where the solicitor of the adverse party resided in the place where the hearing was to be had, and not less than four days where he resided elsewhere, not exceeding fifty miles from the place of hearing, nor less than six days if over fifty and not exceeding one hundred miles; and where he resided more than one hundred miles from the place of hearing, not less than eight days, unless a shorter time is fixed in the order of reference. Chancery, Rule 100.

If the place of reference is not fixed in the order, it is usually appointed in the county where the referee resides, or in which the action is triable, though a party cannot insist that it shall be held there by virtue of any rule of the court. In cases, however, where a reference is ordered on failure of the defendant to answer, it must be held in the county where the action is triable, unless the court otherwise order. Sup. Ct., Rule 33. Both time and place may be fixed by the referee in the summons which he issues to the parties to attend. 1 Van Sant. Eq. Pr. 525.

g. Parties, how brought before referee. Formerly, parties were, in all cases, brought before a referee by means of a summons or warrant. The summons was a paper entitled in the cause and signed by the master, appointing a time and place for the parties concerned to attend him, and containing, by means of an underwriting or memorandum, a general statement of the subject of the reference. 2 Dan. Eq. Pr. 1170. A direction was indorsed upon it by the master, stating the length of time that the summons should be served on the adverse party. Service upon the party was not necessary, but personal service upon the solicitor was sufficient, even for the purpose of bringing the party into contempt for disobeying the summons. *Merritt v. Annan*, 7 Paige, 151. Though this is doubtless the correct practice to be pursued in all cases, it is not uncommon for a party prosecuting an interlocutory reference to obtain from the referee a simple appointment of the time and place, and thereupon to serve an ordinary notice of hearing upon the adverse attorney, and, in case of his failure to attend, to proceed with the reference *ex parte*, unless the testimony of the party himself is required upon such hearing, in which case a summons by the referee must

Who to prosecute the order of reference — What parties to attend, etc.

be first issued in order to enforce his attendance. 1 Van Sant. Eq. Pr. 525. And, under the former practice, the *master* might proceed *ex parte*, if he thought it expedient, where the parties, or some of them, neglected to attend after service of the summons; and such proceedings were not to be reviewed by him, unless, upon a special application by the party who was absent, the master was satisfied that such party was not guilty of willful delay or negligence. Chancery, Rule 104.

h. Who to prosecute the order of reference. Generally, the party obtaining a reference is entitled to the prosecution thereof in the first instance, whether plaintiff or defendant; but, where both parties are interested, the plaintiff is, in the first instance, entitled to the prosecution. *Quackenbush v. Leonard*, 10 Paige, 131.

Under the former practice in chancery, if the party entitled to prosecute the order neglected to do so; that is, if he did not procure and serve the summons within thirty days after the entry of the order, any other party or person interested in the matter of the reference was at liberty to apply to the court, by motion or petition, to expedite the proceedings, and on such motion to have the prosecution of the reference committed to him. Chancery, Rule 101. Or, if the party neglected to prosecute the reference with due diligence after the proceedings were commenced by the service of the summons, the master was at liberty, upon the application of any other person interested, either as a party to the suit, or as coming in to prove his debt, or to establish a claim under the decree or order, to commit to him the prosecution of the reference. In the latter case, notice to the complainant's solicitor must have been given of the application to the master, and of the papers on which it was founded; or the party so applying should have delivered to the master the evidence of the complainant's neglect, and procured a summons for the adverse party, underwritten, to show cause why the prosecution of the order should not be taken from him and committed to the applicant. *Quackenbush v. Leonard*, 10 Paige, 131; *Holley v. Glover*, 9 id. 7; Chancery, Rule 101; *Powell v. Wallworth*, 2 Mad. 183. The same practice, it is thought, may be properly pursued at present, as the Code contains no provisions inconsistent therewith.

i. What parties to attend, and what notice to them. The formal proceedings regulating the reference as to what parties were

Adjournments — Compelling parties and witnesses to attend.

entitled to attend, are not observed under the present practice, and the general rule is to allow all parties to the action who have an interest or claim in the controversy to attend all proceedings on such references. All the parties who have appeared are entitled to notice, either by summons or the service of a notice of hearing; and the referee may, in his discretion, direct such other parties as he thinks are properly entitled to it, to be notified of the proceedings. 1 Van Sant. Eq. Pr. 527.

j. Adjournments. The proceedings before the referee may be from day to day, or by adjournment from time to time, as the referee may think proper; and such was also the former practice in chancery. 1 Barb. Ch. Pr. 477. Such adjournment, however, must not be for an unreasonable length of time. *Forest v. Forest*, 3 Bosw. 650. The fact that adjournments by a referee are not formally made from one hearing to another does not render the proceedings irregular, if both parties gave all the testimony they desired, and submitted the cause on such testimony. *Accessory Transit Co. v. Garrison*, 9 Abb. 141; S. C., 18 How. 1.

k. Compelling parties and witnesses to attend. Where it becomes necessary to have the evidence of the parties, or any of them, on a hearing directed by an interlocutory order, the attendance of such parties can be compelled only by the service of a summons; and under the general provisions of the Revised Statutes, the referee is authorized as an officer of the court, in case the summons be not obeyed, to issue his warrant and bring in the defaulting party. 2 R. S. 401 (417), § 46. See *Bleecker v. Carroll*, 2 Abb. 82; *Leeds v. Brown*, 5 id. 418; *People v. Dutcher*, 3 Abb. N. S. 151.

Section 390 of the Code provides that "a party to an action may be examined as a witness, at the instance of the adverse party, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness, to testify, either at the trial, or conditionally, or upon commission." The same mode of proceeding should, therefore, be adopted to procure the attendance and testimony of a party, at the hearing of the reference, as is pursued to procure the attendance and testimony of a party before a judge on an examination before trial. Witnesses, other than parties, may be required to attend before the referee in the same manner as upon a trial, namely, by the service of a subpoena, and in case of disobedi-

once a motion to the court may be made to attach the witness and punish him for contempt.

l. Compelling production of documents. The proper mode of proceeding to enforce the production of documents on a reference of this nature, in analogy to the former practice in chancery, would be for the referee to issue his summons to the party or witness, in the usual form, underwritten to the following effect: "At which time and place you are required to produce before me all such deeds, books and papers as are in your custody, or power, relating to the matters referred to me." Should any particular document be required, it should be referred to in the underwriting. 1 Barb. Ch. Pr. 481.

The mode of enforcing obedience to the order requiring the production of documents, under the former chancery practice, was by application to the court for process of contempt, as in other cases.

Under the Code a party may, at the instance of an adverse party, not only be compelled to attend and submit to a personal examination, but may also be required to produce books and papers, the same as any other witness; and a witness, when properly subpœnaed, is as much bound to produce books and papers in his possession as to testify orally, and his neglect in either case will be treated as a contempt. *Bonesteel v. Lynde*, 8 How. 226; *Garighe v. Losche*, 6 Abb. 284, note; 14 How. 451; 6 Duer, 685; *Central Nat. Bank of City of New York v. Arthur*, 2 Sweeny, 194.

m. Evidence. The same rules of evidence which govern the courts of law and of equity also regulate the proceedings before the referee; and, as an inquiry directed by the court into a fact is in the nature of a new issue joined, what would be evidence in any other case will be evidence before the referee. *Smith v. Althus*, 11 Ves. 564.

The parties in the action are, therefore, at liberty to make use of all the proceedings which are of record in the cause, whether they be pleadings or in the nature of evidence, such as the depositions of witnesses, or affidavits which have been made use of or filed on former occasions. The pleadings, however, can be used only as admissions by the party on whose behalf they were filed, and not as evidence for or against any other party. *Hoare v. Johnstone*, 2 Keen, 553; *Kemp v. Wade*, id. 686; *Meyer v. Montriore*, 9 Beav. 521. Nor can any evidence be given as to any

issues in the pleadings which have been determined by the decision of the court. *McCrackan v. Valentine*, 9 N. Y. (5 Seld.) 42.

The witness is sworn by the referee, and examined first by the party calling him, and then cross-examined by the opposite party. The referee may also put to the witness such questions as he thinks proper.

The examination is conducted *viva voce*, and the interrogatories put to the witness are such as suggest themselves at the time. On the conclusion of the examination, the testimony is read over to the witness, who may make any corrections he thinks proper, and then sign it, the referee adding his *jurat* in the usual form. Rule 39, Sup. Ct.

ARTICLE III.

PROCEEDINGS ON REFERENCE TO TAKE ACCOUNTS.

Section 1. How to proceed.

a. In general. The proceedings on a reference to take accounts, as formerly conducted before a master in chancery, were regulated by the 107th chancery rule, which directed that "all parties accounting before a master shall bring in their accounts in the form of debtor and creditor; and any of the other parties, who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories, as the master shall direct." On the revision of the chancery rules in 1837, the following was added to the above: "On any reference to take or state an account, the master shall be at liberty to allow interest as shall be just and equitable, without any special directions for that purpose, unless a contrary direction is contained in the order of reference; and every charge, discharge or state of facts brought in before a master shall be verified by oath as true, either positively or upon information and belief." Under this rule, the party accounting was required to bring in his whole account, and for the whole time for which he was accountable, as established by the interlocutory decision of the court, accompanied by an affidavit of the party that the account, including both debts and credits, is correct, and that he does not know of any error or omission therein to the prejudice of the other parties. *Story v. Brown*, 4 Paige, 112; *Benson v. Le Roy*, 1 id. 122.

It has been held, in the decision of a case in the New York

superior court, that the rules and practice of the court of chancery on the subject of accounting, existing at the time of the adoption of the Code, are not inconsistent with any provision of that instrument, and that, consequently, by virtue of the provisions of section 469, they are still in force. *Wiggin v. Gans*, 4 Sand. 646. In the case cited, the defendant was ordered to bring in his account in the manner required by the 107th chancery rule above given, duly verified as above, and file it with the referee within ten days, in default of which the plaintiff might apply for an attachment.

More recently the same rule has been recognized and acted upon by the supreme court. *Ketchum v. Clark*, 22 Barb. 319; *Palmer v. Palmer*, 13 How. 363. See *Brevoort v. Warner*, 8 How. 321.

Although the rule is positive in directing the parties to bring in their accounts in the form of debtor and creditor, it is not always necessary to call upon them to do so. If sufficient appeared from the admissions of the party to be charged, or from any proceeding in the cause, to enable the account against him to be properly made out, the party conducting the proceedings might immediately bring in his charge, that is, the items on the debit side, without calling for any account under the 107th rule. 1 Barb. Ch. Pr. 505. So, under the present practice, although the parties have an undoubted right to demand a strict compliance with the rule, its requirements in many cases of reference are dispensed with, and the referee proceeds to make up and state the account, merely from the papers, vouchers, and evidence produced before him.

The cases in which references to take accounts are most frequently ordered are those of executors and administrators, or of guardians, assignees, or other trustees; or in the winding up of partnership affairs, etc.

b. Form of account. The account to be brought in by the accounting party is made up by stating on the debit side of the account, the property with which he is chargeable; setting forth every sum which has come into his hands, the persons from whom, and the times when such sums were received. On the credit side should be set forth every sum paid, laid out, and expended by the accounting party, and the persons to whom, purposes for which, and times when, such respective sum or sums were expended. The accounts in regard to the rents and profits

Form of account — Examining parties upon interrogatories.

of real estate (if any) are to be made out in a similar manner in a separate account. 1 Barb. Ch. Pr. 506.

If the party fails to bring in his account when required to do so by any person interested, an application may be made to the court on notice and motion, for an order requiring him to render and file it with the referee within a specified time, and, in default, that an attachment issue. 1 Barb. Ch. Pr. 507; *Wiggin v. Gans*, 4 Sandf. 646.

The following is the form of an account in the case of an executor directed to account for the personal estate and effects of the testator received by him, as given in works on chancery practice:

(*Title of cause.*)

The account of the defendant E. F. of the personal estate and effects of G. H., deceased, the testator in the pleadings in this cause named, come to the hands of and received by the said defendant as executor of said testator, and of the disbursements and payments made by the said executor thereof:

1872.

Dr.

January 28. Cash found in testator's dwelling-house at the time of his death	\$250 00
February 29. Cash received from the sale of ten shares of the capital stock of the Mechanics' Saving Bank, Troy	10,000 00
Etc., etc., etc.	

1872.

Cr.

February 10. Cash paid to Mr. R., undertaker, as per bill furnished for funeral expenses	\$75 00
March 1. Cash paid surrogate as fees on probate of will	15 00
Etc., etc., etc.	

The affidavit annexed may be in substance as follows:

FULTON COUNTY, ss:

E. F., the executor of the last will and testament of G. H., deceased, the testator in the pleadings in this cause named, being duly sworn, says: That the foregoing account, including both debits and credits, is correct, and this deponent, the party accounting therein, does not know of any error or omission in said account to the prejudice of any of the other parties.

Sworn, etc.

E. F.

c. Examining parties upon interrogatories. It was the former practice in chancery to examine the party accounting on written interrogatories previously prepared, which were designed

 Proceedings upon accounting.

"chiefly to sift the conscience of the party, and to obtain admissions from him." 1 Barb. Ch. Pr. 484. And the party so examined could give no testimony in his own favor any farther than his answers were considered fairly responsive to the interrogatories of the adverse party. *Benson v. Le Roy*, 1 Paige, 122. In the case of *Wiggin v. Gans*, 4 Sandf. 646, it was held, that a party accounting must still submit to be examined upon interrogatories, as directed by the 107th chancery rule, if required to do so; the decision being based upon the ground that, if such examination was not allowed in that form, the parties interested in the accounting would have no means of obtaining his testimony except to call him as an adverse party to testify under section 395 of the Code, in which case, by that section he might be examined as a witness on his own behalf, and thus prove all his own payments and discharges, which the court considered manifestly unjust.

Since the above decision, however, parties to actions and proceedings have been allowed to testify generally, as witnesses in their own behalf (Code, § 398); and the reason, therefore, for the examination of an accounting party *upon interrogatories* can no longer exist, and the former practice in this respect must be regarded as no longer applicable on such references.

d. Proceedings upon accounting. The party accounting having brought in his account duly verified, and the parties interested having appeared at the time and place appointed for the hearing, the referee proceeds to take the proof offered by the party accounting in support of his *discharges* or payments. These he is required to vouch by producing receipts, etc., for the same; and he must not only be prepared to vouch his payments but must also establish the propriety of their having been made, if the same is disputed. 1 Barb. Ch. Pr. 510.

In the English chancery practice, although, strictly speaking, every payment insisted upon in the discharge, where it amounts to forty shillings and upward, must be established by a proper voucher, sums under forty shillings may be substantiated by the oath of the accounting party, provided that, in his account, he mentions to whom, for what, and when the amounts were paid. *Anonymous*, 1 Vern. 283; *Marshfield v. Weston*, 2 id. 176; *Everard v. Warren*, 2 Ch. Cas. 249; *Remsen v. Remsen*, 2 Johns. Ch. 501. It was intimated by Chancellor Kent, in the latter case, that \$20 in this State would not be considered an

Proceedings upon an accounting — When allowances may be made.

unreasonable substitute for the forty shillings sterling established in the early history of the court.

It is provided by statute that, on the settlement of an account of an executor or administrator, he may be allowed any item of expenditure, not exceeding \$20, for which no voucher is produced, if such item be supported by his own oath positively to the fact of payment, specifying when and to whom such payment was made. But such allowance shall not, in the whole, exceed \$500 for payments in behalf of any one estate. 2 R. S. 92 (95), § 55.

Notwithstanding the general rule, requiring vouchers, a party accounting is sometimes allowed to discharge himself by other means. Thus, where the evidence produced to charge an accounting party consists of entries in books kept by the party himself, the party has a right to make use of entries in the same book in support of his discharge. *Darston v. Earl of Oxford*, 1 Eq. Cas. Abr. 10. And so, if a paper is produced by one of the parties, from which he takes his charge, the same paper may be read by the other party by way of discharge (*Carter v. Lord Colrain*, Barnardist, 126. See *M. E. Church v. Jaques*, 3 Johns. Ch. 81; 2 Dan. Ch. Pr. 1228); and, when an account is of long standing, the court will sometimes permit the accounting party to discharge himself upon oath, of all such matters as he cannot prove by vouchers by reason of their loss. *Peyton v. Green*, 1 Ch. Rep. 146; *Holtscornb v. Rivers*, 1 Ch. Cas. 127. See *Turner v. Corry*, 5 Beav. 515; *Millar v. Craig*, 6 id. 433; *Kirkman v. Booth*, 11 id. 273; *Alfrey v. Alfrey*, 1 McN. & G. 87; 10 Beav. 353.

e. What allowances may be made. In taking any account directed by a decretal order, the referee is authorized to allow the parties such disbursements as may appear to have been fairly and properly made by them. As to what may be considered just allowances, much must depend upon the circumstances of each case; but it is a settled rule, that whatever a trustee or personal representative has expended in the fair execution of his trust may be allowed to him in passing his accounts. See *Laws of 1858*, ch. 314, § 3. Thus, where a trustee, in the fair execution of his trust, has expended money by reasonably and properly taking opinions, and procuring directions necessary to the due execution of his trust, he is entitled not only to his costs, but to his charges and expenses under the head of just allowances.

When allowances may be made — Allowance of commissions.

Fearns v. Young, 10 Ves. 184; *Pettibone v. Stevens*, 15 Conn. 19. And an executor or trustee, who requires the assistance of a solicitor or counsel in the execution of his trust, will be allowed the amount he has *properly* paid for such services. 1 Barb. Ch. Pr. 514. He will not, however, be allowed the costs of unsuccessful litigation which he has imprudently commenced. *Chambers v. Smith*, 2 Coll. 742.

Where it is necessary to the due execution of their office that trustees, etc., should employ accountants, agents or receivers under them, they are entitled to be allowed the costs of such agents, etc. *Vanderheyden v. Vanderheyden*, 2 Paige, 287. The expenses of a sale may also be allowed under the head of just allowances. *Crumpp v. Baker*, 18 Ves. 285.

Necessary disbursements in traveling, expenses for carriage and horse hire, and other personal expenses, are frequently allowed on the accounting of trustees, executors, etc., under the head of "just allowances," but they cannot receive for their services or for loss of time any greater compensation than the statute commissions, however meritorious those services may be. Thus, one of the executors of a will, who is an attorney and counselor at law, will not be allowed any fees whatever from the estate for professionally defending and conducting an action brought against the estate, although requested by his co-executors to appear in such action and undertake such defense with a promise of compensation, and although the legatees and next of kin united in such request. *Collier v. Munn*, 41 N. Y. (2 Hand) 143; S. C., 7 Abb. N. S. 193; *Vanderheyden v. Vanderheyden*, 2 Paige, 287. See *Morgan v. Morgan*, 39 Barb. 20; *Lansing v. Lansing*, 45 id. 182; S. C., 31 How. 55; 1 Abb. N. S. 280; *Gilman v. Gilman*, 2 Lans. 1. Nor will the court allow any thing to be placed to account under the name of *general expenses*, but the party accounting must prove the particular items. *Anonymous*, 1 Eq. Cas. Abr. 11. Thus, the allowance of a sum in gross in an administration account, without items or explanations, is improper. *Swan v. Wheeler*, 4 Day, 137. See *Field v. Hitchcock*, 14 Pick. 405.

f. Allowance of commissions. The allowance of commissions to executors or administrators in the settlement of their accounts is thus prescribed by statute: Five per cent on all sums received, and the same on all sums disbursed or paid out by them, on an account not exceeding \$1,000; two and one-half per cent on all

Allowing and computing interest.

sums received, and the same on sums disbursed, beyond \$1,000 and not amounting to \$10,000, and one per cent on all sums exceeding \$10,000. 2 R. S. 93 (95), § 58; Laws of 1863, ch. 362. Guardians, committees of lunatics and other trustees are also entitled to the same commissions or compensations for services. *Vanderheyden v. Vanderheyden*, 2 Paige, 287; *King v. Talbot*, 40 N. Y. (1 Hand) 77, 96; *Meacham v. Sternes*, 9 Paige, 398; *Cowing v. Howard*, 46 Barb. 579. It becomes the duty, therefore, of the referee, to ascertain and determine the proper amount of commissions to be allowed to the party accounting, and to credit him with it in taking and stating his accounts.

g. Allowing and computing interest. On a reference to take or state an account, the master (referee) shall be at liberty to allow interest as shall be just and equitable, without any special directions for that purpose, unless a contrary direction is contained in the order of reference. Chancery, Rule 107. In the allowance or disallowance of interest, and in making rests in the account, the referee usually follows the established principles of law and equity.

With respect to a debt due on a bond, the rule is to calculate interest up to the amount of the penalty of the bond (*Sharpe v. Earl of Scarborough*, 3 Ves. 557); beyond which amount the referee cannot go (*Clarke v. Seton*, 6 Ves. 411; but see *Mower v. Kip*, 6 Paige, 89), unless the creditor claims upon two securities for the same sum, one of which is a bond with a penalty, and the other a mortgage. In such a case the interest may be calculated beyond the penalty of the bond. *Clarke v. Lord Abingdon*, 17 Ves. 106.

As to debts upon simple contract, and other debts which do not carry interest on the face of them, equity in giving interest follows the rules of law, and the court will allow interest to be computed, in the administration of assets, upon all debts on which interest is given by courts of law. *Parker v. Hutchinson*, 3 Ves. 135; *Upton v. Lord Ferrers*, 5 id. 803; *Lowndes v. Collens*, 17 id. 29; 1 Barb. Ch. Pr. 515. Thus, the balance due upon a stated account between the parties will carry interest. *Barwell v. Parker*, 2 Ves. 363.

But, as a general rule, a charge of debts on real estate does not entitle simple contract creditors to interest. *Earl of Bath v. Earl of Bradford*, 2 Ves. 588; *Barwell v. Parker*, id. 363; *Lloyd v. Williams*, 2 Atk. 109. Interest is never computed on

Allowing and computing interest.

debts not previously carrying interest (*Creuze v. Hunter*, 2 Ves. 165); and in computing subsequent interest on the debts which carry interest, although it was formerly held that the interest, when computed by the master, became principal and would carry interest, the rule now is not to compute interest upon interest reported to be due, even in the case of a mortgage (*Whatton v. Cradock*, 1 Keen, 267); though the practice formerly was, to consider the interest as principal from the date of master's report (*Turner v. Turner*, 1 Jac. & W. 47), on the ground that, as the party came for the favor of the court, he was ordered to pay a given sum on a certain day, and, if he did not, he was put under terms of paying what would indemnify the other party completely. *Turner v. Turner*, 1 Jac. & W. 47; 2 Dan. Ch. Pr. 1259. See *Hunn v. Norton*, 1 Hopk. 344.

When the interest is ordered to be computed with rests, the object of the court is to charge the accounting party with compound interest, and the proper course is, to add the interest to the principal, at the time of the rest, and to compute interest upon the aggregate sum. *Raphael v. Boehm*, 11 Ves. 97; *King v. Talbot*, 40 N. Y. (1 Hand) 76.

It was the rule, under the former practice, that the master was not at liberty to make rests in the account, unless directed so to do by the decree (*Webber v. Hunt*, 1 Mad. 13); and the correct rule of practice still seems to be, that, on a mere reference to take an account, the referee is not at liberty to make rests, and compute compound interest, without some special direction or authority given in the order of reference. 1 Van Sant. Eq. Pr. 540. See *King v. Talbot*, 40 N. Y. (1 Hand) 76, 80; S. C. below, 50 Barb. 453. When the accounting is completed, the charge and discharge, that is, the statement of items of debit and credit, are usually attached to the report in the form of schedules, and are the sources from which the referee ascertains the balance. 1 Barb. Ch. Pr. 513.

The following is a general form for an interlocutory order for an accounting:

Order for an accounting.

At a special term of the supreme court held for the State of New York at the city hall, in the city of Albany, on _____, A. D. 187 .

Present: Hon. A. B.,
Justice.

Order for an accounting — Proceedings on reference to make inquiries.

(Title of cause.)

This action having been brought on to be heard, and the court having duly considered the pleadings, proofs and arguments herein, it is ordered and adjudged that it be referred to E. B., of _____, as referee, to take a mutual account of all dealings and transactions between the plaintiff and defendant in this action; for the better elucidation of said accounts, the said parties are required to produce before said referee, upon oath, all deeds, books, papers and writings, in their custody or power relating thereto; and the said parties are to be examined, as the said referee shall direct, in all matters touching said deeds, papers, books and accounts; and the said referee, in taking such accounts, shall make unto the parties all just allowances, and what, upon the balance of said account, shall appear to be due from either party to the other, is to be paid as the said referee shall direct. And this court reserves the consideration of the costs of this action, and of all further directions, until after the said referee shall have made his report, when either party is to be at liberty to apply to the court as occasion shall require.

ARTICLE IV.

PROCEEDINGS ON REFERENCE TO MAKE INQUIRIES.

Section 1. How to proceed.

a. In general. Inquiries, before decree or judgment, are usually directed either in relation to persons or to facts, though sometimes they are directed as to matters of law, in cases where questions of law are so mixed up with the fact to be ascertained that it is not possible to decide upon the one without giving an opinion as to the others. In such cases the master (referee) is bound to give his opinion upon the law, as well as upon the matter of fact, referred to him. 2 Dan. Ch. Pr. 1203.

b. Inquiries as to persons. The cases in which inquiries are most usually directed as to persons are those in which it is necessary to ascertain the heir at law or next of kin of a deceased person, or to ascertain individuals forming a particular class, such as grandchildren, or cousins of a person deceased, or persons entitled to a particular fund, etc. *Good v. Blewitt*, 19 Ves. 336. A similar inquiry is also necessary where, on the reference, an account of the debts due by a particular individual are directed to be taken; such account involving necessarily an inquiry who the creditors are, as well as into the amount of their claims. 1 Barb. Ch. Pr. 517.

 Proceedings on reference to make inquiries.

In all these cases the interlocutory, or decretal order, usually specifies the mode in which the inquiries are to be prosecuted, as, for example, that the referee cause an advertisement to be published that such heirs, or other persons, come in by a day appointed and prove or establish their claims, in default of which they are to be excluded from the benefit of the decree. 2 Dan. Ch. Pr. 1203-4. This advertisement is drawn up and signed by the referee, and published in such papers as may be directed by the decree; and it is usual, also, to have a copy of it inserted in one or more of the newspapers published near the place where the testator resided. The parties claiming should appear before the referee on the day, and at the place named, and establish their claims. But, it seems, notwithstanding this peremptory direction, the referee may let them in afterward, and at any time before his report is made and filed, upon their showing a sufficient excuse for not coming in, and upon payment of all the costs produced by the delay. *Wilder v. Keeler*, 3 Paige, 164. After the filing of the referee's report, their application to be let in must be made to the court; and such application, it seems, may be made at any time, so long as there is a fund in court unapportioned, and in which the parties are interested. *Lashley v. Hogg*, 11 Ves. 602; *Hartwell v. Colvin*, 16 Beav. 140; *Pratt v. Rathbun*, 7 Paige, 271.

This mode of procedure by a creditor or other claimant, desirous of coming in after a report has been made, is by petition to the court, stating his reason for not having come in within the time limited by the advertisement, and praying to be at liberty now to establish his claim. The petition must be supported by the affidavit of the claimant, and must be served on the parties to the cause. 2 Dan. Ch. Pr. 1205. The claimant must also be able to prove that he has not been guilty of *laches*. *Cattell v. Simons*, 8 Beav. 243. The other terms and conditions upon which he will be allowed to come in will, of course, depend upon the circumstances of each particular case; and, if it be a proper one, the court will make an order, referring it back to the referee, to make the inquiries.

It may be proper to notice here that the course of proceeding by advertisement, requiring persons having claims to come in under a decree, is resorted to only where it is unknown who all the parties are; for, if all the persons who have, or who claim, an interest in the controversy are *known*, they must be made

parties, and the court will cause them to be brought in (Code, § 122; *Davis & Palmer v. The Mayor, etc., of the City of New York*, 2 Duer, 663; *Shaver v. Brainard*, 29 Barb. 25); and in such case the proceeding as above is never proper. Accordingly, where a reference is ordered to take an account of the legacies or annuities given by a will, the legatees or annuitants appearing by the will itself, no direction in the order to advertise for them to come in is necessary, unless the legacy is given to persons constituting a class, in which case it may be necessary to ascertain by advertisement who the persons constituting the class are. 1 Barb. Ch. Pr. 519.

In making his report, it is not usual for the referee to notice any creditors, except those who come in under the decretal order. He merely states the names of the parties who have appeared and established their interest, and the claims which have been proved, taking no notice of the possible claims of others, who, whether entitled or not, did not come in. *Good v. Blewitt*, 19 Ves. 336; 2 Dan. Ch. Pr. 1206.

Where a person, who has not come in under a decree, seeks to compel those who have been benefited by the distribution, which has taken place under the decree, to refund, he cannot proceed against one only for the whole amount of his demand, but must proceed against them all, in order that they may all be compelled to contribute in proportion to what they have received. *David v. Frowd*, 1 M. & K. 200.

c. Inquiries as to fact. The cases in which a reference may be directed for the purpose of making inquiries into facts are very numerous, and so diversified in their nature that it is impossible to point out all the rules in accordance with which each inquiry is to be pursued before the referee. Inquiries of this nature have reference to titles, claims, the situation, description and boundaries of real estate, the existence and priorities of liens and incumbrances, etc.; and although, in some of these cases, the proceedings on the reference are subsequent to, and consequent upon, final judgment, yet, in their general features, they are similar to other references of this kind, and may properly be considered in the same connection.

d. Inquiries as to titles, liens, etc. References to inquire as to the title to property in question in the cause are principally made in actions for the specific performance of contracts, or agreements for the sale or purchase of real estate (*McComb v.*

Inquiries as to title.

Wright, 4 Johns. Ch. 659) ; and, as they are in the nature of a preliminary inquiry, they must be directed by an interlocutory order. 2 Dan. Ch. Pr. 1215. Inquiries into titles, however, are not confined to actions for the specific performance of contracts, but may also occur incidentally in actions having other objects, as, for example, in a partition suit, as regulated by the provisions of the present rules of the supreme court. Rules 79 and 80.

The inquiry under the 80th rule is an inquiry directed *both* as to *persons* and *facts*, the referee being required not only to take proof of the title and inquire into the situation of the property, for the purpose of ascertaining if it can be actually partitioned, but he is also to ascertain and report as to the claims of creditors, *not parties to the suit*, in the shape of specific or general liens upon the premises. This being absolutely required by statute, can in no case be dispensed with. 2 R. S. 324 (333), § 53 ; *Wilde v. Jenkins*, 4 Paige, 481 ; 1 Van Sant. Eq. Pr. 543. To accomplish this, the referee proceeds as previously noticed, by advertisement for six weeks in the State paper, and also in a newspaper printed in each county in which the lands are situated, as required by the provisions of the statute. 2 R. S. 324 (334), § 44. For full proceedings upon a partition reference, see Partition.

Upon an inquiry as to title, it is not necessary to carry in a state of facts ; but the referee proceeds upon the abstract, usually furnished for his use by the party charged with the conduct of the reference. Such party also causes the necessary searches to be made, and lays before the referee the proper certificates of search, title, deeds, etc. If no abstract has been delivered, an application may, if necessary, be made to the court, by motion, that the vendor's attorney may deliver one to the purchaser's attorney. 1 Barb. Ch. Pr. 520.

On litigated questions of title, written objections to the abstract are brought in by the party objecting, and the referee is either attended by counsel on both sides, or the written opinions of counsel upon the abstract are produced to him, according to circumstances. In cases of difficulty the referee may also direct the abstract to be laid before a conveyancer for his opinion. *Flower v. Walker*, 1 Russ. 408 ; 1 Barb. Ch. Pr. 520.

The referee may summon witnesses and examine them, as in other cases, in regard to deaths, intestacy, descent, and such other facts as may be necessary, bearing upon the question before him. If he is satisfied with the title, as shown by the

vendor, he reports accordingly ; but, if he is not satisfied with the title, he must state the points wherein it is defective. *Green v. Monks*, 2 Molloy, 325. The mere circumstance that since the contract a suit has been instituted by other parties, and is pending, in which part of the lands are claimed adversely to the vendor, is not a sufficient ground for reporting against a title. *Obaldiston v. Asken*, 1 Russ. 219. The nature of the adverse claim, however, should be examined on the inquiry. 2 Dan. Ch. Pr. 1217.

Where the title is reported defective, the purchaser cannot insist upon being discharged, if the title is capable of being made good within a reasonable time. *Coffin v. Cooper*, 14 Ves. 205. But the rule is otherwise, when it appears that the purchaser will have to wait a long time. *Whittaker v. Whittaker*, 4 Bro. C. C. 31 ; *Coffin v. Cooper*, 14 Ves. 205. If, after the referee has reported in favor of a title, any new fact appears by which the title is affected, the court will refer it back to the referee, upon motion, even after the report has been confirmed. *Jeudwine v. Alcock*, 1 Mad. 597. So, if the referee reports in favor of the title, but, upon exceptions, the court thinks the evidence insufficient, it will, upon the application of the vendor, refer it back to the referee to review his report, so as to enable the vendor to produce further evidence. *Andrew v. Andrew*, 3 Sim. 390.

So where it appears, at the hearing of exceptions to a report against a title, that a vendor can clear up the objections, the court will sometimes send the title back to the referee to review his report. 1 Barb. Ch. Pr. 521. But, after exceptions are taken to the report that a good title can be made, and are overruled, other objections to the title cannot be made. If, however, exceptions are allowed and a new abstract of title is delivered, further objections may, as a matter of course, be brought in. *Brooke v. —*, 4 Mad. 212. See *Fildes v. Hooker*, 3 Mad. 193.

A title will be considered to be complete whenever it appears that, upon certain acts being done by persons whom the vendor has the means of compelling to concur, the legal estate will be in the purchaser. *Lord Braybrooke v. Inskip*, 8 Ves. 436 ; *Lewin v. Guest*, 1 Russ. 325.

c. *Reference in divorce cases.* The purposes for which an interlocutory decree may direct a reference in divorce cases, and the manner of proceeding on such references, has already been briefly noticed. *Ante*, 345, art. 1, § 1, g. The proceedings are

Claim to surplus money on a foreclosure sale.

similar to those in other cases where a reference is directed to make inquiries as to facts. See Divorce.

f. Reference as to claims. A reference of this nature may be ordered by interlocutory decree, either before final judgment, or subsequent thereto. The purposes for which such a reference may become necessary, and the manner of proceeding thereon, have already been noticed. *Ante*, 343, 344, art. 1, § 1, *e*.

g. Claim to surplus money on a foreclosure sale. A reference, for the purpose of determining the disposition of surplus moneys arising in an action of foreclosure, is a proceeding subsequent to final judgment, and after the filing of the report of sale. The practice on such a reference is at present regulated by the provisions of the 77th rule of the supreme court, and differs but slightly from the former practice in chancery, as prescribed by chancery rule 136.

By rule 73 of the supreme court it is provided that "All surplus moneys arising from the sale of mortgaged premises, under any judgment, shall be paid by the sheriff or referee making the sale, within five days after the same shall be received and be ascertainable; in the city of New York to the chamberlain of said city, and in the other counties to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court; and every judgment in foreclosure shall contain such directions, except where other provisions are specially made by the court. No report of sale shall be filed or confirmed unless accompanied with a proper voucher for the surplus moneys, and showing that they have been paid over, deposited or disposed of in pursuance of the judgment."

The practice thereon is thus regulated by rule 77 of the supreme court as above noticed: "On filing the report of the sale, any party to the suit, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed, a notice, stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim, may have an order of reference, to ascertain and report the amount due to him, or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report, on such reference, such further order may be made for the distribution of such surplus moneys as may be just. Every party who ap-

Order of reference as to surplus moneys.

peared in the cause, or who shall have filed such notice with the clerk previous to the entry of the order of reference, shall be entitled to service of a notice of the application for the reference, and to attend on such reference, and to the usual notices of subsequent proceedings relative to such surplus. But if such claimant has not appeared or made his claim by an attorney of this court, the notice may be served by putting the same in the post-office, directed to the claimant at his place of residence, as stated in the notice of his claim."

Under the former chancery rule (136) the order of reference was allowed as of course; but it will be seen by the provisions of the present rule that application must be made to the court on notice to every party who has appeared in the cause, and also to every person who has filed a notice of claim with the clerk, to attend on such reference. This may be the usual eight days' notice, and it will be sufficient for the claimant merely to refer to the statement of his claim on file with the clerk, without serving any copy of such statement with the notice.

Order of reference as to surplus moneys.

At a special term of the supreme court, held for the State of New York at the city hall, in the city of Albany, on
A. D. 1872.

Present, HON. PLATT POTTER, *Justice*.

(Title of cause.)

The referee's (or sheriff's) report of sale having been filed in this action, and the same having been confirmed, from which it appears that there is a surplus paid into court arising from the said sale; on reading and filing affidavit and notice of claim by G. D., to such surplus moneys or some part thereof, by virtue of a lien thereon under a junior mortgage (or a judgment against, etc.), given by the defendant, E. F.; on motion of C. B. K., of counsel for the said G. D., it is ordered that it be referred to R. B. S., of, etc., counselor at law, as are ferees to ascertain and report the amount due the said G. D., or to any other person, which is a lien upon such surplus moneys, and as to the priorities of the several liens thereon. And it is further ordered, that such referee summon before him on the reference every party who has appeared in this action, and every person who has delivered written notice of his claim to such surplus moneys, and that he cause them to have the usual notice of all subsequent proceedings, and report thereon with all convenient speed.

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Order of reference as to surplus moneys.

The referee is appointed by the court, and the proceedings on the reference are conducted in a manner similar to proceedings in other cases of interlocutory references. See *ante*, art. 2.

Before proceeding to make his report as to such surplus moneys, the referee should ascertain by the certificate of the clerk, or other evidence, that all claimants and other proper parties have been notified or summoned to attend before him on such reference; and the fact that such certificate or evidence was produced before him should be stated in the report. *Hulbert v. McKay*, 8 Paige, 651; *Franklin v. Van Cott*, 11 id. 129; S. C., 3 N. Y. Leg. Obs. 162.

The plaintiff in a foreclosure suit is not required to establish beforehand all the claims he may have upon the mortgaged premises; but he has the same right to present and establish a claim to the surplus moneys as a defendant in such suit, or any other person. *Field v. Hawxhurst*, 9 How. 75.

Parties, or other claimants, upon a reference as to surplus moneys, must verify their claims in the same manner as creditors coming in under a decree are required to do; and the referee may examine the claimants upon oath touching their respective claims. *Hulbert v. McKay*, 8 Paige, 651.

An incumbrancer, who has neglected to file his claim, may go before the referee pending the reference as to such surplus, and file his claim with him duly verified; and he will then be entitled to be heard upon the reference as to the validity of such claim, upon such equitable terms as to costs as the referee shall direct. *Ib.*

The priorities of the several liens must be established before the referee, and the facts found as to such priorities must be stated in his report. The liens referred to in the above rule (77 of the supreme court) are absolute liens only, as distinguished from equitable claims not matured into liens. *Husted v. Dakin*, 17 Abb. 137. And it has been held that claims, however equitable, which are not matured into liens under which the property can be charged in execution and sold without further adjudication, cannot be taken into consideration by the referee. *King v. West*, 10 How. 333; *Husted v. Dakin*, 17 Abb. 137. See *Mutual Life Ins. Co. of New York v. Bowen*, 47 Barb. 618.

In regard to the costs of the proceeding, the rules of the court are silent; but, if allowed at all, they are allowed by the court on the motion to confirm the report and distribute the surplus,

Proceedings on reference to sell estates or adjust matters before final judgment.

and not by the referee. 1 Van Sant. Eq. Pr. 549. Under the former practice, which is probably still followed, the rule was, that a party to the suit, if a creditor, was allowed the costs of carrying in and supporting his charge; but a creditor, who was not a party to the suit, must bear the expense of carrying in his own charge. And, under special circumstances, the court even refused to allow such a creditor the expense of proving his charge (*Abell v. Screech*, 10 Ves. 355, 359; 1 Barb. Ch. Pr. 525); but, it seems, this was so, only where there would still remain a surplus of a fund to be distributed among other parties. *Ib.* Where the fund was wholly divisible among the creditors, they would be allowed the costs of proving their debts; and it was held, that where the proof made by the creditor is beneficial to the estate, as where he saves by it the expense of a suit, and has incurred considerable extraordinary costs, he ought to be allowed the same. *Harvey v. Harvey*, 6 Mad. 91.

The report of the referee, as to the distribution of surplus moneys, is made, filed, and may be excepted to or confirmed, as in other cases. 1 Van Sant. Eq. Pr. 549. See Foreclosure.

ARTICLE V.

PROCEEDINGS ON REFERENCE TO SELL ESTATES OR ADJUST MATTERS BEFORE FINAL JUDGMENT.

Section 1. How to proceed.

a. In general. The object of an interlocutory reference embraced in the class under consideration in the present chapter is to have some act done relative to the disposition of the property in dispute, or in respect to the subject-matter of the suit, or the parties thereto, as, for example, the partition and division of estates and the sale of real property, the settlement of deeds, appointment of new trustees, etc., which are necessarily required to be done before final judgment can be rendered upon the whole controversy.

b. Partition and division of real estate. The proceedings on a reference, for the partition and division of real estate, are regulated by the provisions of the Revised Statutes (2 R. S. 321, 330), which, by section 448 of the Code, are made applicable to such cases. These proceedings have already been noticed (*ante*, 346, art. 1, § 1, *h*), and see Partition, where the matter is fully discussed.

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Sale of real estate — Time, place and notice of sale.

c. Sale of real estate. Formerly, a sale of real estate, under a decree or interlocutory order, was made by a master in chancery; the sale being conducted either by the master himself, or by an auctioneer or some person employed by him for that purpose, in his presence and under his immediate direction. *Heyer v. Deaves*, 2 Johns. Ch. 154. The office of master in chancery, having been abolished by the constitution of 1846, it was soon afterward provided, that any matter before referred to a clerk, master or referee, might be referred to a clerk, county judge, etc., or other suitable person or persons, with the same power as heretofore possessed by such officer or person. Judiciary Act of 1847, § 77. A sale and conveyance of real estate by a referee depended upon this section of the above act, and upon section 471 of the Code until 1851, when, by the amended Code of that year, section 287 was altered by adding the following clause: "Real property adjudged to be sold must be sold in the county in which it lies, by the sheriff of the county, or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser; which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold." The addition of this clause to section 287 of the Code was probably made for the purpose of obviating any questions which might arise as to the power of the referee to sell, and his authority to do so may now be regarded as wholly free from doubt. See *Jennings v. Jennings*, 2 Abb. 6; *Knickerbocker v. Eggleston*, 3 How. 130.

d. Time, place and notice of sale. The Code directs that sales must be made in the county in which the real estate lies, section 287; and rule 74 of the supreme court contains the following provisions respecting the time and notice of sale: "Where lands in the city of New York are sold under an order or judgment of any court, they shall be sold at public auction, between twelve o'clock at noon and three in the afternoon, unless otherwise specially directed. The notice of the sale of lands lying in any of the cities of this State, in which a daily paper is printed, except where a different notice is required by law, or by the order of the court, shall be published in one or more of the daily papers of that city for three weeks immediately previous to the time of sale, at least twice in each week. When lands in any other part of the State are directed to be sold at auction, notice of the sale shall be given for the same time, and in the same

manner as is required by law, on sales of real estate by sheriffs on execution."

Such notice on sheriff's sales is thus prescribed by statute :

"The time and place of holding the sale shall be publicly advertised, previously, for six weeks successively as follows :

"1. A written or printed notice thereof shall be fastened up in three public places in the town where such real estate shall be sold, and if such sale be in a town different from that in which the premises to be sold are situated, then such notice shall also be fastened up in three public places of the town in which the premises are situated.

"2. A copy of such notice shall be printed once in each week in a newspaper of such county, if there be one.

"3. If there be no newspaper printed in such county, and the premises to be sold are not occupied by any person against whom the execution is issued, or by some person holding the same as tenant or purchaser under such person, then such notice shall be published in the State paper, once in each week." 2 R. S. 369 (382), § 34. It is further provided, that in every such notice the real estate to be sold shall be described with common certainty, by setting forth the name of the township or tract, and the number of the lot if there be any, and if there be none, by some other appropriate description. *Id.*, § 35.

The lands to be sold by the referee are usually described by metes and bounds in the decree or order of sale; and in foreclosure judgments this is required to be done by the rule of the court. Sup. Ct., Rule 73. Such description should be followed in the notice of sale; and the referee is not at liberty to insert further particulars in such notice for the purpose of unduly enhancing the value of the property or misleading the purchaser. *Veeder v. Fonda*, 3 Paige, 94.

Although not absolutely necessary, it is the proper practice to insert the title of the cause in the notice of sale; which is usually done by stating the name of the first plaintiff and of the first defendant at length, and by adding the words "and others" where there are several plaintiffs or defendants. *Ray v. Oliver*, 6 Paige, 489.

It has been held to be a sufficient compliance with the requirements of the statute, if the notice of sale be posted forty-two days previous to the sale, and a copy of the same published in six successive numbers of a weekly newspaper, although the

first publication may be less than six weeks prior to the sale. *Olcott v. Robinson*, 21 N. Y. (7 Smith) 150; reversing S. C., 20 Barb. 148. See *Wood v. Morehouse*, 45 N. Y. (6 Hand) 368; 1 Lans. 405. And a notice of sale for the 28th of December, 1861, published on the 9th and 12th, on the 16th and 19th, and on the 23d and 26th of December, has been held sufficient to satisfy the rule of the court (74), which requires the notice of sale of lands, lying in any of the cities of this State, to be published "for three weeks immediately previous to the time of sale, at least twice in each week." *Chamberlain v. Dempsey*, 22 How. 356; S. C., 13 Abb. 421. And it has been held that the notice prescribed by rule 74 has no application to sales of lands in cities, in partition suits; the rule being applicable only to those cases in which the statute has omitted to prescribe the duration of the notice, as upon foreclosure sales, or sales of the lands of infants or lunatics, etc. *Romain v. McMillan*, 5 How. 318.

In an action of partition, where the plaintiff died, pending the advertisement of sale, and his heirs were substituted in his place, it was held unnecessary to advertise anew, changing the title of the cause. *Thwing v. Thwing*, 9 Abb. 323; S. C., 18 How. 458. But when the time for selling, pursuant to notice, has passed, and no valid sale has been made, or, if valid, the party elects to disregard it, the officer cannot again sell without an order of the court, unless he again advertise the sale. *Bicknell v. Byrnes*, 23 How. 486.

As to all questions arising between the vendor and purchaser, the plaintiff's attorney is considered as the agent of all the parties to the action, and the proceedings on the sale are generally supervised by him. *Dalby v. Pullen*, 1 Russ. & My. 296.

The notice of sale is usually drawn up and posted by the plaintiff's attorney; and he also prepares a statement of the conditions of sale, which is usually annexed to the notice. This statement should specify the terms and conditions of the sale, time of payment of the purchase-money, what amount is to be paid down, when and where the deed is to be delivered, whether there is to be any deduction for taxes and assessments, etc.; but it need not describe the nature and situation of the property, that being fully done in the notice of sale, to which the statement is usually annexed.

It is also prudent to state in the conditions of sale, that if the

purchaser fails to comply with the terms of sale, by paying down the requisite portion of the purchase-money, a resale will take place immediately; otherwise, if bidders leave the place of sale, under the supposition that the sale would be completed, and in default of its being so completed, the premises should be again put up and bid off for a less price, such second sale may be set aside. *Lents v. Craig*, 13 How. 72; S. C., 2 Abb. 294.

e. Postponement. The referee possesses a discretionary power to postpone the sale from time to time, either for want of bidders or for any other reasonable cause; but where this discretionary power is arbitrarily exercised, or the referee acts unreasonably, the sale will be set aside and a re-sale ordered. *Breeze v. Busby*, 13 How. 485.

Neither the statutes nor the rules of the court contain any express provision, requiring the day to which a postponement of a sale is made to be named; but it is, undoubtedly, the general rule that such day, and the place of holding the postponed sale, should be specified at the time of the adjournment (*La Farge v. Van Wagenen*, 14 How. 54); and, if the adjournment be made for a sufficient length of time, notice of the postponement should be published, as well as posted in three public places, as required by the statute in case of the original notice. 1 Van Sant. Eq. Pr. 555.

f. Mode of conducting sale. It is the duty of the referee or person conducting the sale to attend at the time and place appointed; and, after reading the notice of sale, including the description of the premises, to announce the terms and conditions of the sale. He must then offer the premises to the highest bidder, and receive bids, so long as they are offered, waiting a reasonable time after a bid is made for another, and if no other is made, to strike off the premises to the highest bidder. *Bicknell v. Byrnes*, 23 How. 486.

“Where mortgaged premises, or other real estate, directed to be sold, consist of several distinct lots or parcels, which can be sold separately without diminishing the value thereof on such sale, it shall be the duty of the sheriff, or other person conducting the sale, to sell the same in separate lots or parcels, unless otherwise especially directed by the court. But if the sheriff, or other person, is satisfied the property will produce a greater price if sold together than it will in separate lots or parcels, he may sell

it together, unless otherwise directed in the order of sale." Sup. Ct., Rule 75.

The provisions of this rule, it will be observed, leave it in the discretion of the officer conducting the sale, to sell in parcels or together, as in his judgment will be most advantageous to the estate, notwithstanding the statute positively requires "distinct farms, tracts or lots to be sold separately." 2 R. S. 546 (566), § 6.

It has been held, however, that the above provision of the statute is merely directory, and that a sale made in disregard of it is not void, but only voidable on application for relief within a reasonable time, by the party aggrieved; and that such party may waive the irregularity of the sale by express ratification, or by neglect to move within a reasonable time. *Cunningham v. Cassidy*, 7 Abb. 183; S. C., 17 N. Y. (3 Smith) 276; *Woods v. Monell*, 1 Johns. Ch. 503; *Ames v. Lockwood*, 13 How. 555; *Merchants' Ins. Co. v. Hinman*, 3 Abb. 455. See *Wells v. Wells*, 47 Barb. 416; *Wolcott v. Schenck*, 23 How. 385; *Ellsworth v. Lockwood*, 42 N. Y. (3 Hand) 89; *Sherman v. Willett*, id. 146; *Husted v. Dakin*, 17 Abb. 137; *Lamerson v. Marvin*, 8 Barb. 9; *Griswold v. Fowler*, 4 Abb. 238; *Griffith v. Hadley*, 10 Bosw. 587; *American Ins. Co. v. Oakley*, 9 Paige, 259.

Where the premises sold consist of two or more parcels, which had been previously held, used and conveyed together as one farm, a sale of the whole in one parcel is good. *Anderson v. Austin*, 34 Barb. 319. See *Whitbeck v. Rowe*, 25 How. 403.

Under the provisions of rule 73 the complainant, or any other party to the suit, may become the purchaser at a mortgage sale, the judgment or decree containing a clause to that effect; but the court will not permit a party, under such a judgment or decree, to conduct the sale. *Domville v. Berrington*, 2 Younge & Col. 724.

If it be intended to give any owner of a reversionary or other interest in the land, who is a party to the record, the right to become a bidder at a sale of real estate, a provision to that effect should also be inserted in the order or judgment directing such sale. 1 Barb. Ch. 528.

The plaintiff's attorney may bid off the property, and if he does so in his own name, the presumption is that the purchase was made on his own account. *Chappell v. Dann*, 21 Barb. 17. See *Squier v. Norris*, 1 Lans. 282. One defendant may become

Resale of real estate, when ordered and how made.

the purchaser of the real estate of a co-defendant (*Neilson v. Neilson*, 5 Barb. 565); and a person being the owner of land subject to a lien, and not being the debtor, may become the purchaser and acquire a title under the sale. *Chautauque County Bank v. Risley*, 19 N. Y. (5 Smith) 370.

The sale is required to be held between the hours of 9 A. M. and the setting of the sun (2 R. S. 369), and a sale after sunset would be void. *Carrick v. Myers*, 14 Barb. 9.

g. Resale, when ordered and how made. A resale will be ordered in all cases where it would be unfair or inequitable to allow the sale to stand; as, for example, if the sale be conducted in such a manner as to prevent fair competition among bidders, (*American Ins. Co. v. Oakley*, 9 Paige, 259); or if it be made at an improper time (*Brown v. Frost*, 10 Paige, 243; *King v. Platt*, 35 How. 23; S. C., 37 N. Y. (10 Tiff.) 155; 3 Abb. N. S. 434); or if there has been fraud or misconduct on the part of the purchaser (*Billington v. Forbes*, 10 Paige, 487; *Tripp v. Cook*, 26 Wend. 143; *Murdock v. Empie*, 19 How. 79; 9 Abb. 283); or fraudulent negligence or misconduct on the part of any other person connected with the sale (*Stahl v. Charles*, 5 Abb. 348; *Gould v. Gager*, 18 id. 32; S. C., 24 How. 440). In all these cases the sale will be set aside, and a resale ordered by the court. Any person whose rights are injuriously affected by a judgment, or a sale of property under it, may move to set it aside, although he is not a party to the suit. *Kellogg v. Howell*, 62 Barb. 280.

In granting the order for a resale, the court now, as formerly, acts upon the circumstances of each particular case; and special circumstances must in all cases exist where the sale is not absolutely void, to justify an order for a resale. *Lefevre v. Laraway*, 22 Barb. 167.

Mere inadequacy of price is not a sufficient ground for ordering a resale, unless the inadequacy is so great as to be evidence of unfairness or fraud in the sale. *Kellogg v. Howell*, 62 Barb. 280; *American Ins. Co. v. Oakley*, 9 Paige, 259; *Murdock v. Empie*, 9 Abb. 283; S. C., 19 How. 79; *Collier v. Whipple*, 13 Wend. 224; *Gould v. Gager*, 24 How. 440; S. C., 18 Abb. 32. Neither will a resale be ordered upon a mere offer of an advance price. *Lefevre v. Laraway*, 22 Barb. 167. And where property is regularly advertised and fairly sold, a resale will not be directed for the benefit of parties interested in the proceeds of the sale, for the purpose of protecting them against the conse-

Mode of applying for resale of real estate.

quences of their own negligence, such parties being adults and competent to protect their own rights on the sale. *The American Ins. Co. v. Oakley*, 9 Paige, 259.

And if the sale is well attended and fairly conducted, it should not be set aside, even in the case of infants, unless it is made to appear that, upon a resale, their share of the proceeds, after indemnifying the purchaser at the first sale, will be materially increased. *Merchants' Ins. Co. v. Hinman*, 3 Abb. 455; *Stryker v. Storm*, 1 Abb. N. S. 424. Resales are ordered upon less evidence of fraud, surprise, accident or misconduct of the officer making the sale, when the plaintiff or mortgagee is the purchaser, and the rights of third parties, or *bona fide* purchasers, have not intervened, than when a stranger to the suit is the purchaser. *Kellogg v. Howell*, 62 Barb. 280.

h. Mode of applying for resale. If, for any of the causes before mentioned, or for any other cause, it would be inequitable to permit the sale to stand, the proper remedy is by an application to the court, on motion, for an order setting aside the sale and directing a resale of the premises. *St. John v. Mayor, etc., of New York*, 13 How. 527; S. C., 6 Duer, 315; *Gould v. Mortimer*, 26 How. 167; S. C., 16 Abb. 448.

Notice of the motion for a resale must be given to every party who has appeared in the cause, and who has an interest in the question, as well as to the purchaser at the first sale. 1 Barb. Ch. Pr. 541; *Robinson v. Meigs*, 10 Paige, 41.

As a general rule, the proper time for making application for a resale, is before the master's (referee's) report of the sale has been confirmed absolutely (*Brown v. Frost*, 10 Paige, 243; *Strong v. Dollner*, 2 Sandf. 444), but under very special circumstances the court may, after confirmation of the report, set the same aside, and order a resale. 1 Barb. Ch. Pr. 541; *Lansing v. McPherson*, 3 Johns. Ch. 424.

It has been held that a defendant, who is personally liable for the deficiency upon a sale of mortgaged premises, but who has no interest in the premises, cannot apply for a resale, if he has been discharged from liability for the deficiency, to the extent of the full value of the premises, over and above the amount bid at the former sale. *Bodine v. Edwards*, in chancery, August 1, 1843, cited in Barb. Ch. Pr. 541.

The proceedings upon the resale are the same as those upon the original sale. *Williamson v. Dale*, 3 Johns. Ch. 290.

i. Completing sale. The premises being struck off to the highest bidder, the purchaser is to sign an acknowledgment which is usually written under the conditions of sale, to the effect that he has purchased the premises on those conditions, for the sum bid by him, and agreeing to comply with such conditions. The contract, however, is not regarded as complete when the agreement is signed, and the purchaser will not be entitled to the benefit of it until the referee's report of the sale is confirmed absolutely. 2 Dan. Ch. Pr. 1274.

ARTICLE VI.

REFEREE'S REPORT ON ORDER.

Section 1. Form, nature and use.

a. In general. The practice, as regards the report of a referee on an *interlocutory* reference under the Code, is to be governed by, and to be in accordance with, the rules of practice formerly observed in the court of chancery (*Ketchum v. Clark*, 22 Barb. 319), except where such rules are inconsistent with any of the provisions of the Code (§ 469), or with the written rules of the court. Sup. Ct., Rule 97. But no provision has been made, either in the Code, or by the rules of the court, relative to such reports, other than the general one contained in rule 39 of the supreme court, allowing exceptions to be taken to them within eight days after notice of filing, etc., which will be more appropriately considered in a subsequent article.

It hence follows that, in order to ascertain what rules should now govern on this point of practice, it will be necessary to examine the former practice in chancery relating to the master's report on a similar reference.

b. Different kinds of. The report of the master was the means whereby his opinion and the result of his inquiries on the reference were presented to the court, and it might be either *general* or *special*. General reports embraced the master's conclusions upon all the matters referred to him by the decree or order of reference, but special or separate reports embraced only one distinct object of the reference, and were made in cases where the inquiries were numerous, and it was a matter of importance that a part of the decree should be satisfied before the whole of the proceedings were sufficiently matured to enable the master to make a general report. 1 Barb. Ch. Pr. 544, 545.

c. Special report. Formerly, the master was not at liberty to make a separate report, unless authorized to do so by the decree or order; but, by the 108th chancery rule, which existed at the adoption of the Code, and which is held to be still applicable, it was provided that, in all matters referred to a master, he should be at liberty, upon the application of any party interested, to make a separate report or reports, from time to time, as he should deem expedient; the costs of such separate reports to be in the discretion of the court. And when the master should make a separate report of debts or legacies, he should be at liberty to make such certificate as he thought fit with respect to the state of the assets; and any person interested might thereupon apply to the court as he should be advised. Chancery, Rule 108.

The cases hitherto reported under the present system, sanctioning the practice of making separate reports upon one of the issues, leaving other matters, such as an accounting, etc., for a further and final report, belong to that class of references (not interlocutory) where the *whole issue* has been referred. See *Palmer v. Palmer*, 13 How. 363; *McMahon v. Allen*, 27 Barb. 336; 7 Abb. 1; *Bantes v. Brady*, 8 How. 216; *Pratt v. Stiles*, 9 Abb. 150, 157.

Such practice, however, may no doubt be still resorted to on an interlocutory reference under the present as well as under the former system, as, for example, where a decretal order directs, among other things, a receiver or trustee to be appointed, the master (referee) may certify or report separately such appointment, and afterward proceed upon the accounting or other matter referred. *Harris v. Kemble*, 4 Russ. 474; 1 Van Sant. Eq. Pr. 562.

The form, manner of preparing, objecting and excepting to, and confirming separate reports, are nearly the same as upon general reports. The only difference being that, where it is intended to act upon them, the cause is not set down for hearing as it is upon a general report, but a petition must be presented to the court, praying such directions as arise out of the separate report. 2 Dan. Ch. Pr. 1294.

d. General report, form of, etc. The referee, having obtained all the information necessary to enable him to prepare his general report, which must comprise the conclusions which he has come to upon all the matters referred to him by the interlocutory decree, he proceeds to make a draft thereof, which commences

with the title of the cause, and is addressed to the supreme court.

In point of form, it may be like the master's report, under the former practice in chancery, divided into two parts, the body and the schedules — the body of the report being a short epitome of the proceedings laid before the referee, with his opinion and finding thereon. It contains only the results of the accounts or statements, and refers to the schedules for detailed particulars. 1 Barb. Ch. 548.

The report refers to the order of reference by its date, and should recite the substance of the directions contained in it, but it should not recite the whole order.

In preparing a report, great care is required, in order to dispose of all the matters which have been referred, either by findings of the referee upon each section of the decree, or by pointing out what matters of reference have been waived; and, where a separate report has been made, it will be necessary, in the general report, briefly to allude to the date and particulars of it, so that the court may see that all the inquiries directed by the order have been, in some way, disposed of by the referee. 2 Dan. Ch. Pr. 1296.

When it is referred to a referee to examine and report as to particular facts, or as to any other matter, it is his duty to draw the conclusions from the evidence before him, and to report such conclusions only, and it is irregular and improper to set forth the evidence in his report without the special direction of the court. *In re Hemiup*, 3 Paige, 305; *Harris v. Fly*, 7 id. 421; *Lee v. Willock*, 6 Ves. 605.

Although the referee cannot detail the evidence upon which he proceeds in making his report, he generally refers to it either in the body of his report or in a schedule annexed to it. And sometimes the order directs the referee to report the testimony, or to report it if either party require him to do so, in which cases the testimony should be annexed, certified by him, but not embodied in the report. 1 Hoff. Ch. Pr. 545.

It may be here observed, that even when the evidence is such that it is impossible to arrive at any degree of certainty upon it, yet, if it is sufficient to afford a reasonable ground of presumption one way or the other, the referee is bound to find in favor of such presumption. See *Fenner v. Agutter*, 1 Mylne & Keen, 120. He is not, however, bound to state inferences of law arising from

the facts before him ; and where facts are so clearly stated in a report as to necessarily involve a particular consequence, it is for the court to act upon the facts so reported. *Bick v. Motley*, 2 Mylne & Keen, 312. See *In re Hemiup*, 3 Paige, 305.

The referee is not warranted in reporting his opinion upon a question of *intention*; the court alone taking cognizance of that question. *Pitt v. Lord Camelford*, 1 Ves. 83. And upon a reference as to title, a report, generally, that a good title cannot be made out is irregular. The precise points in which the title is defective should be stated by the referee. *Green v. Monks*, 2 Molloy, 325.

The schedules, when there are any, must be annexed to the report and filed with it. *Smith v. Smith*, 2 Dick. 789.

The proper mode of procedure at present, in ordinary cases at least, after the testimony is closed and the case finally submitted, is for the referee to draw up and sign his report, and deliver it to the prevailing party, without pursuing the mode of settlement and hearing objections, which was the practice before a master in chancery at the time the Code went into effect. 1 Van Sant. Eq. Pr. 563. It is doubtless optional, however, with the referee to adopt the former practice, as regulated by the 109th chancery rule, since the cases before alluded to seem to recognize that, as well as the other chancery rules on the subject of interlocutory references, as still existing. *Palmer v. Palmer*, 13 How. 363; *Ketchum v. Clark*, 22 Barb. 319.

The above rule provides, that when the master (referee) has prepared the draft of his report, he shall deliver copies thereof to such of the parties as apply for the same, and shall assign a time and place for the parties to bring in objections, and for settling the draft of the report, and shall issue his warrant for that purpose ; and no summons to see the draft of the report and take copies thereof shall be necessary. On the return of the warrant, or on such other day as may then be assigned by the master (referee) for that purpose, if objections are filed by either party, he may proceed to hear the parties on such objections, and the master (referee) shall settle and sign his report, and cause it to be filed in the proper office within twenty days after the argument on such objections is closed. If no objections are made to the draft, the master (referee) shall sign his report, and file it in the proper office within ten days after the time assigned for bringing in objections. Chancery, Rule 109.

Exceptions to report — When and how taken, and brought to hearing.

Either party, on examining the draft of the report, may bring in his objections, on the day assigned, stating that some evidence has been misunderstood, some fact not found, or improperly found, or that some irregularity or error is apparent on the face of the draft of the report. The objections, especially in important cases, should be carefully drawn by counsel, but need not be signed by him; and as they are to serve as the ground work of future exceptions, they are generally the same in form and substance as the exceptions proposed to be taken. And this is so far true, that if the exceptions go beyond the objections, or assign matter not comprised in them, they will to that extent be deemed irregular and overruled. 1 Barb. Ch. Pr. 547.

If a person interested in the report, though not a party to the suit, is dissatisfied with it, he must leave objections to the draft as a preliminary step to putting himself in a situation to take exceptions. Thus, creditors and other persons coming in under decrees, and who have had their claims allowed, must, if they mean to except to the report, carry in their objections to the draft, in the same manner as parties to the record. 2 Dan. Ch. Pr. 1303.

After hearing and considering the objections, the referee may, if he thinks proper, modify or alter the draft of his report accordingly, he then signs the report, and may himself file it in the proper clerk's office, agreeably to the provisions of the 109th chancery rule.

ARTICLE VII.

EXCEPTIONS TO REPORT.

Section 1. When and how taken, and brought to hearing.

a. In general. Under the former practice in chancery the usual method of reviewing or correcting the master's report was by taking exceptions to it. 1 Barb. Ch. Pr. 556. So, under the Code, the same course of procedure is usually followed in reviewing the referee's report in all cases other than a report made upon the trial of issues; that is, by filing exceptions with the clerk, within eight days after notice received of the filing of the report, and bringing such exceptions to a hearing at a special term of the court. Sup. Ct., Rule 39.

By the former practice, however, there are cases in which the court will direct the master to review his report, without requir-

Mode of reviewing by exceptions.

ing exceptions to be taken ; or, if taken, will direct it to be reviewed upon other grounds than those covered by the exceptions (1 Dan. Ch. Pr. 1320) ; and it is presumed the same is true under the present practice, relative to the review of a referee's report of the class under consideration.

In some cases also, the court will direct a review, upon application by motion ; as where there has been some error, or omission in the report which would prevent the matter from being properly raised by exceptions (*Anonymous*, 3 Mad. 246) ; or the review may be directed upon the hearing for further directions ; as where the court is not satisfied with the referee's finding ; or the referee has not found sufficient facts for the court to render judgment upon. *Turner v. Turner*, 1 Dick. 313 ; S. C., 1 Swanst. 156 n.

A report is not properly reviewable on exceptions, merely on the ground of irregularity in the proceedings before the referee ; but in such case the appropriate remedy is by application to the court, on motion, to set aside the report, or refer it back to the referee to correct the irregularity. *Tyler v. Simmons*, 6 Paige, 127. And where the report is made in a special proceeding the court will, if the objections to the report are not apparent upon the face of it, entertain a petition to refer it back to the referee to be reviewed. 2 Dan. Ch. Pr. 1320.

b. Mode of reviewing by exceptions. It may be observed in general, under this head, that the present mode of reviewing a report on exceptions is in all respects similar to the former practice in chancery, the thirty-ninth rule of the supreme court providing that, after the filing of the report with the clerk, the same shall become absolute, and stand as in all things confirmed, unless *exceptions* thereto are filed and served within eight days after the service of notice of filing the same. Sup. Ct., Rule 39.

And even prior to the adoption of the provisions in the above rule, which clearly settles the question, the practice to be pursued in such cases was thus pointed out by Justice HARRIS, namely, that the only way to review such a report was by means of exceptions, founded on objections before the referee, according to the customary chancery practice, such exceptions to be brought to argument on notice at special term and heard upon the report, the exceptions thereto, and a copy of the testimony taken by the referee and certified by him. *In the Matter of Merritt, Trustees*,

In what cases and on what grounds exceptions lie — Who may except.

etc., Albany special term, July, 1858, not reported, cited in 1 Van Sant. Eq. Pr. 566. See *Ketchum v. Clark*, 22 Barb. 319.

c. In what cases and on what grounds exceptions lie. Where a party desires to object to the principle upon which an account is taken by the referee, he should except to the report, and, in case he neglects to do so, the court will not send back the report to be reviewed, even if it appears that the referee has proceeded on erroneous principles. *Brown v. Sansome*, McClel. & Young, 427. Exceptions may also be taken to any erroneous ruling of the referee upon matters of law, upon the proceedings before him, either in the erroneous admission or rejection of testimony, *etc.* 1 Van Sant. Eq. Pr. 566. But where the referee, in his report, states all the facts correctly, but arrives at an erroneous conclusion as to the legal consequences of those facts, it is not necessary to except to the report, as this question may be opened and decided by the court, upon further directions, without exceptions. *Adams v. Claxton*, 6 Ves. 226. So where facts are so clearly stated in a report as necessarily to involve a particular consequence, it is for the court to act upon the facts so reported, and it will not be a proper ground for exception that the referee has omitted to point out the consequence. *Bick v. Motly*, 2 Myl. & Keen, 312. And it has been held that, in case of a report under a reference, for the master (referee) to inquire and certify his opinion, exceptions are not to be taken to the report, but it is to be brought before the court, on the report, for the court to judge and determine. *Neal v. Billing*, 1 Dick. 93.

Where a party, on the reference, produces and examines a witness before the referee, but neglects to inquire as to a particular item in the account, which the witness alone could explain, he cannot afterward except to the report as incorrect in respect to such item. *Barrow v. Rhineland*, 3 Johns. Ch. 614.

d. Who may except. All the parties to the suit who are interested in the matter in question may take exceptions to the report; and where there are several sets of parties appearing by different solicitors, they may, if they are not disposed to join, each take exceptions, although their grounds of exception are the same. 2 Dan. Ch. Pr. 1311.

Creditors who have established their claims before the referee are also permitted to except to the report, although not parties to the suit. *Wilson v. Wilson*, 2 Molloy, 328. And so also are creditors who have preferred claims, which have been rejected

Exceptions, how taken, and form of.

by the referee. It is necessary, however, before they do so, to first obtain permission of the court, which they may do upon motion, of course. 2 Dan. Ch. Pr. 1311.

Persons claiming as next of kin, whose claims have been disallowed by the master (referee), may except. *Walker v. Wingfield*, cited, 2 Dan. Ch. Pr. 1312. As may also a purchaser under a decree for sale. *Ker v. Cloberry*, cited, 2 Dan. Ch. Pr. 1312.

e. Exceptions, how taken, and form of. Great care was required by the former practice in preparing the exceptions, in order that they might point out the precise objection, and raise the particular question which the party desired to review. They were held to be in the nature of special demurrers, and the party objecting must point out the error; otherwise, the part not excepted to would be taken as admitted. *Wilkes v. Rogers*, 6 Johns. 566. And where one general exception was taken to a report including several distinct matters, and the report appeared right in any one instance, the exception would be overruled. *Candler v. Pettit*, 1 Paige, 427; 3 Wend. 618; *Franklin v. Keeler*, 4 Paige, 382.

But under the present system it has been held that *formal* exceptions to reports under interlocutory decrees are not necessary. *Evertson v. Givan*, 16 How. 25. It is sufficient, if the objections be taken on the hearing and entered by the referee in his minutes, as in case of a trial before him, and after notice of filing the report, specific exceptions be filed and served within the eight days, and substantially in the form of the chancery practice. 1 Van Sant. Eq. Pr. 568. It is to be observed, however, that although it is absolutely necessary that exceptions be filed if the party desire to raise his objection (Rule 39, Sup. Ct.), yet, if he file a mere general exception, the court may, doubtless, if it choose, review the whole report; both upon the referee's conclusions of law and of fact. This was sometimes done even under the former practice; as, for example, under a master's report under a reference as to title. For, although it was the usual course to state the ground of objection to the title in the exceptions, the rule was only adopted for convenience, and if there was any substantial objection to the title not stated in the exceptions, the party was not precluded by the court from arguing it. 1 Barb. Ch. Pr. 551; 1 Van Sant. Eq. Pr. 569.

It was held in a case under the former practice that an excep-

Form of exceptions to report — Filing and serving exceptions, etc.

tion to a master's report as to the manner of computing interest, instead of merely stating that the master had not adopted the usual or legal mode, should indicate in what manner the interest should be computed, so that, if the exception is allowed, the master will know in what manner to correct his report. *Matter of Crittenden*, in chancery, May 17, 1842, cited in 1 Barb. Ch. Pr. 551.

*Form of exceptions to report.**(Title of cause.)*

Exceptions taken by the above plaintiff (or W. M., the defendant), to the report of C. B. K., Esq., the referee, dated the day of

First exception. That the said referee has, in and by his said report, reported that , etc. (*state cause of exception*). Whereas, the said referee ought to have found and reported that, etc.

Second exception, etc., etc. (*State each exception separately.*)

In all which particulars the said plaintiff, G. W. (or W. M., the defendant), excepts to the said report, and demands that the same may be reversed or modified accordingly.

R. B. S.,
Attorney for plaintiff.

f. Filing and serving exceptions and noticing for hearing.

The exceptions having been properly drawn, they must be filed with the clerk of the county where the action is triable, and the clerk is required to make a note of the day of filing in the proper book, under the title of the cause or proceeding; and a copy of the exceptions must be served on the opposite party, which filing and service must be within eight days after notice served of filing the report. If the exceptions are filed and served within such time, they may be brought to a hearing at any special term thereafter, on the notice of any party interested therein. Sup. Ct., Rule 39.

If the party who excepts bring on the hearing, notice of the same may be served at the same time with the service of a copy of the exceptions.

If the party filing the report is satisfied with it, and is desirous of bringing on the cause for a hearing thereon upon further directions, and obtain his final judgment, he may give notice of such hearing immediately on filing the report, and at the same time serve notice of the filing thereof, and such notices may both be embraced in the same paper. *Kendall v. Rider*, 35 Barb. 100.

In case any adverse party wishes to except, he must do so within eight days thereafter, and the moving party may then immediately notice the exceptions for hearing at the same time and place with the final hearing of the cause, if he have sufficient time to do so ; and if not, may then serve a new notice either to bring on the exceptions separately, or the exceptions and final hearing of the cause together. *Forest v. Forest*, cited, 1 Van Sant. Eq. Pr. 570 *n.* See *Gregory v. Campbell*, 16 How. 417.

g. Hearing and argument of exceptions. Upon such hearing of exceptions to the report, the party excepting must furnish the necessary papers for the court, copies of the report, exceptions and pleadings. In case the testimony taken before the referee be not annexed to, or returned with, the report under the order of the court, either party may apply to the referee for certified copies of such testimony, which may be used upon the hearing. 1 Hoff. Ch. Pr. 545 ; *In re Merritt*, Albany Special Term, July, 1858, cited, 1 Van Sant. Eq. Pr. 566.

Affidavits, taken subsequent to the report cannot, however, be read upon the hearing (*Davis v. Davis*, 2 Atkyns, 21) ; nor can any evidence be read upon the hearing which was not used before the referee and entered in his report as having been read. *Ridifer v. O'Brien*, 3 Mad. 43 ; *Rands v. Pushman*, 6 Sim. 46.

This rule, under the former practice, also precluded the reading of any parts of the defendant's answer which were not read in the master's office. *Hedges v. Cardonnell*, 2 Atk. 408. But under the present system the rule is doubtless changed, in this respect, the answer now being a *pleading* merely, whereas, under the former practice, it not only served as a pleading but also as *evidence*.

It has been held in one case under the Code, that, where exceptions are taken and the cause is brought on for final hearing with the exceptions, the court will not only look to the pleadings but will receive other evidence in its discretion, and will consider any stipulations offered, and admissions of the parties, or of other persons presented to it on the hearing. *Gregory v. Campbell*, 16 How. 417.

h. Decision and proceeding thereon. If, upon argument, the exceptions are overruled, the overruling of them has all the effect of confirming the report absolutely ; and if the cause has been set down to be heard upon further directions, to come on at the same time with the hearing of the exceptions, the court

Decision and proceeding thereon — Final hearing on further directions, etc.

proceeds at once to hear the cause upon further directions. So, if the exceptions, or any of them, are allowed, but it is not necessary to refer the report back to the referee to be reviewed, the hearing of the cause upon further directions may be proceeded with in the same manner as if the exceptions had been overruled. 2 Dan. Ch. Pr. 1318.

If the allowance of the exceptions, or any of them, renders it necessary to refer the matter back to the referee, an order is entered to that effect; and the reservation of further directions and of the costs of the suit is continued until the coming in of the new report. See *Daubeny v. Coghlan*, 12 Sim. 507.

In some cases, upon the allowance of an exception to a report, it is unnecessary to send it back for review. Thus where an exception is allowed as to the amount of damages sustained, the court can modify the report and settle the amount without referring it back to the referee. *Taylor v. Reed*, 4 Paige, 561.

And sometimes, if the court think proper, it may, before it comes to a decision upon the subject-matter of the exception, send the report back to be corrected, by supplying some defect, or ascertaining some fact which may be necessary to enable the court to come to a proper conclusion. In such cases, the court usually adjourns the consideration of the exceptions, or of the particular exception in question, until the referee shall have made the supplemental report. 2 Dan. Ch. Pr. 1319.

So, also, when the subject-matter of the exception is a fact depending upon certain conflicting evidence, the court will frequently, before it decides upon the exception, direct an issue at law to try the disputed fact, reserving the decision upon the exception till after the trial. *Wilson v. Metcalfe*, 3 Mad. 45. See *Gregg v. Taylor*, 4 Russ. 279.

ARTICLE VIII.

FINAL HEARING ON FURTHER DIRECTIONS UPON COMING IN OF REFEREE'S REPORT.

Section 1. How to proceed.

a. In general. The effect of an interlocutory or decretal order, directing a reference at the original hearing, for the purpose of taking an account, etc., is to adjourn the cause for further directions, until the coming in of the report of the referee; and, in

When cause may be heard — Where to be heard.

order to obtain a *final* decree or judgment, it is necessary that the cause should again be set down to be heard for further directions.

The decree of the court is usually *final* on such hearing, but the report may be sent back for review, or it may be necessary to institute further inquiries necessary to final judgment; and, in such case, the cause must again be brought on for hearing, which process must be repeated as often as any further directions are reserved by the last decree pronounced. 1 Barb. Ch. Pr. 558.

b. When cause may be heard. A cause, however, cannot be heard upon further directions, until the accounts or inquiries directed by the interlocutory decree have been taken or made, and the referee's report of their result filed, and notice thereof served; that is, there must be a *general* report made, in pursuance of the interlocutory decree or order. 2 Dan. Ch. Pr. 1366.

If a separate report has been made, the cause cannot be so brought to a hearing, but the order on such separate report must be obtained on petition. *Van Kamp v. Bell*, 3 Mad. 430.

The court will not allow the cause to be set down for further directions before the report has been made, even though it is found that the reference has become useless. The proper procedure in such case is to obtain a modification of the order of reference. *Dixon v. Olmius*, 1 Ves. 153.

The plaintiff is entitled to bring on the hearing of the cause, even though he has himself excepted to the report (*Yeo v. Frere*, 5 Ves. 424); and there seems to be no objection to his noticing his cause for hearing immediately on filing the report of the referee, the notice of hearing being embraced in, and served with, the notice of filing. 1 Van Sant. Eq. Pr. 574.

Under rule 39 of the supreme court, any interested party may bring the exceptions to argument; and if the exceptions be filed within the prescribed time (eight days), the final hearing and exceptions may, no doubt, be brought to a hearing together on a simple notice of either party. *Gregory v. Campbell*, 16 How. 417.

c. Where to be heard. The hearing, upon further directions, is at special term or circuit, and the cause is usually placed regularly upon the calendar, the date of the issue being the date of the original trial issue. *Gregory v. Campbell*, 16 How. 417.

Hearing.

Inasmuch as the hearing, upon further directions, is not a *trial*, but in the nature of an application for judgment after trial and decision by the court, it does not seem absolutely indispensable to put the cause on the calendar.

They have, therefore, been allowed to be brought on as non-enumerated motions, at a mere motion term, and in a county other than the place of trial, in the same district. 1 Van Sant. Eq. Pr. 574.

d. Hearing. The course of proceeding at the hearing is much the same as that pursued at the original hearing. The papers necessary for the use of the court are furnished by the plaintiff's counsel; and, as on other motions, the plaintiff's counsel opens, the defendant's counsel replies, and the plaintiff's counsel closes the argument. *Forest v. Forest*, cited, 1 Van Sant. Eq. Pr. 575.

If default is made by the defendant in appearing, the court, on proof of filing the report eight days previous, and of service of notice thereof, and of hearing, will pronounce final judgment in conformity with the former decision and the report of the referee. In case exceptions have been taken to the referee's report, and have been set down for argument at the same time with the further directions, they are to be heard and disposed of before the cause is heard upon the further directions. 1 Barb. Ch. Pr. 560. See *Yeo v. Frere*, 5 Ves. 424. This rule, however, is not regarded as inflexible in present practice, and the court may, in its discretion, for its own convenience, or other good cause, direct the whole matter to be disposed of together in one argument. 1 Van Sant. Eq. Pr. 575.

Upon the hearing on further directions, if a party has not excepted to the referee's report, he is concluded by the findings therein; but, if all the circumstances appear upon the face of the report, a question decided by the referee may be opened on the hearing without any exceptions having been taken. *Adams v. Claxton*, 6 Ves. 226, 230; *Evertson v. Givan*, 16 How. 25. And if a referee has exceeded his authority, a party who has omitted to take exceptions is not concluded by the confirmation of the report. *Lewis v. Loxam*, 1 Mer. 179.

As a general rule, upon the hearing on further directions, the court will not enter on any matter extraneous to the decree or decision, or receive any evidence beyond the report; and whenever such matter arises, it is necessary to present a petition to come on to be heard, together with the further directions. *Par-*

nell v. Price, 14 Ves. 502. Thus, if any new facts have occurred since the original decision which have altered the situation of the parties, or affected their rights in the subject-matter; as, if the interest of a party in the fund in court, or any part of it which is to be disposed of on further directions, has been sold or assigned, the purchaser or assignee may apply by a special petition to come on with the further directions, that the money may be paid over to him, which petition need only be served on the vendor or assignor of the share. 1 Van Sant. Eq. Pr. 576. It has, however, been held in an action to foreclose a mortgage, that where the cause is brought to hearing on the report of the referee, to which exceptions had been duly taken, that the report is but part of the evidence before the court, and upon which it is called upon to decide whether it will or will not be most beneficial to the parties to decree a sale of the whole premises in one parcel in the first instance; and the court, it is said, in such case, will look to the pleadings and will receive other evidence in its discretion, and will consider any stipulations offered and admissions of the parties, or of other persons presented to it on the hearing. *Gregory v. Campbell*, 16 How. 419.

e. Decision and proceedings thereon. If the hearing upon further directions, on the coming in of the referee's report, is final, the court proceeds to render final judgment upon the decision already rendered at the original hearing, and upon the report of the referee; and, in general, the court will make no order, upon further directions, altering or varying the original decree (*Lord Shipbrooke v. Lord Hinchinbrook*, 13 Ves. 387, 394); even though a new state of circumstances appears by the referee's report, showing that if the facts, as they are stated in the report, had been before the court at the time the decision was pronounced, it would not have given the directions contained in the decision. *Wilson v. Metcalfe*, 1 Russ. 530.

The court will, however, make an order in aid of, or additional to, such decision on further directions, even though no question of the kind was reserved. Thus, in cases where, upon the decree, and the report under it, a proper ground appears for giving interest, the court will direct it to be computed on further directions, though the question of interest has not been reserved; but it will, if the report makes a new case against the defendant, for charging him with sums which, but for his willful default, he might have received, make an order for charging him, on fur-

ther directions, even where it was prayed in the bill of complaint and refused at the hearing, from deficiency of proof. *Franklin v. Beamish*, 2 Molloy, 383.

And so, although a receiver has been refused at the hearing of the cause; yet, if, upon the report, a new state of facts appears, as, for example, a balance in the hands of the defendant, the court will entertain a renewed application for a receiver, upon the hearing on further directions. *Attorney-General v. Mayor of Galway*, 1 Molloy, 95.

CHAPTER VII.

NEW TRIAL.

ARTICLE I.

MOTION FOR NEW TRIAL.

Section 1. General rules applicable.

a. In general. A new trial has been defined to be "a re-investigation of the facts and legal rights of the parties upon undisputed facts," and either upon the same, or different, or additional evidence before a new jury, and probably, but not necessarily, before a different judge. 4 Chit. Gen. Pr. 30.

The practice of granting new trials, in causes tried before a jury, is of very ancient origin, instances being recorded in the year-books as early as the reign of King Edward III. See 3 Bl. Com. 388; 3 Broom & Had. 365. The first regularly reported case, however, in which a new trial was granted, is that of *Wood v. Gunston*, Styles, 466, which was in the year 1655, and was granted on the ground of excessive damages given by the jury.

But, although the utility of the remedy was thus acknowledged at so early a period, it was only with the greatest difficulty that it could be obtained, and a party, though justly entitled to relief, was in many cases unsuccessful in procuring it. Bills of exception and demurrers to evidence, on account of any supposed misconduct of the judge who tried the cause, were probably unknown at common law, and, although new trials might at all times have been granted, on account of the mistake or misdirection of the judge, or the mistake or misconduct of the jury, yet it was found that the judge sometimes returned to the court, in banc, a very incorrect statement, as his *report* of the supposed proceedings on the trial; and, in case of dispute, it became the practice to treat such report as *conclusive*. See *Adams v. Bankart*, 5 Tyr. 425; *Stanley v. Twogood*, 2 Hodge, 135. If the judge who tried the cause should have, in fact, improperly resolved that the verdict he had occasioned should stand, and that a new trial should not be granted, he could effect his object by returning to the court in banc an incorrect or defective report of the

General rules applicable — How far discretionary.

proceedings on the trial, and thus induce the other judges in full court to refuse a new trial. 4 Chit. Gen. Pr. 2.

This defect in the administration of justice was to some extent remedied by the enactment of the statute of Westminster 2 (13 Edw. I, c. 31), which required the judge who tried the cause to seal a bill of exceptions; but it was not till a later period, and after the practice of moving the court for a new trial, had, to a great extent, superseded the proceeding by bill of exceptions or demurrer to evidence, that new trials began to be more liberally granted in furtherance of justice. The necessity for affording the remedy of a new trial against an improper verdict will be obvious from a careful consideration of the wide extent of interests which the juries are called upon to decide. It has been well observed that "causes of great importance, titles to land, and large questions of commercial property, come often to be tried by a jury, merely upon the general issue; where the facts are complicated and intricate, the evidence of great length and variety, and sometimes contradicting each other; and where the nature of the dispute very frequently introduces nice questions and subtleties of law. Either party may be surprised by a piece of evidence which (had he known of its production) he could have explained or answered; or may be puzzled by a legal doubt which a little recollection would have solved. In the hurry of a trial, the ablest judge may mistake the law and misdirect the jury; he may not be able so to state and range the evidence as to lay it clearly before them, nor to take off the artful impressions which have been made on their minds by learned and experienced advocates. The jury are to give their opinion *instantly*; that is, before they separate, eat or drink. And, under these circumstances, the most intelligent and best intentioned men may bring in a verdict which they themselves, upon cool deliberation, would wish to reverse." 3 Bl. Com. 390.

A new trial, granted under proper restrictions, operates as an effectual remedy to all these inconveniences, and serves to render the administration of justice through the decision of a jury almost wholly free from objection.

As to the general importance of the right to a new trial, see *Bright v. Eynon*, 1 Burr. 390; *Platt v. Munroe*, 34 Barb. 291, 297, 298.

b. How far discretionary. Motions for new trials, unless solely made on exceptions, or on the ground of irregularity

How far discretionary — For irregularities — Want of due notice of trial.

(*Underhill v. New York and Harlem R. R. Co.*, 21 Barb. 489; *Farmers and Manufacturers' Bank v. Whinfield*, 24 Wend. 427), are addressed to the legal discretion of the court, whether based upon the weight of evidence, surprise, or newly-discovered evidence, or the fact that the party has been deprived of his evidence by accident, or other like grounds. *Donley v. Graham*, 48 N. Y. (3 Sick.) 658; *Tyler v. Hoornebeck*, 48 Barb. 197; *Dickson v. Broadway and Seventh Avenue R. R. Co.*, 47 N. Y. (2 Sick.) 507; *Platt v. Munroe*, 34 Barb. 291. See *Warner v. Western Transportation Company*, 5 Rob. 490; *Gray v. Bridge*, 11 Pick. 189; *White v. Trinity Church*, 5 Conn. 187.

In actions of an equitable nature, an application for a new trial is so far within the discretion of the court, that the existence even of irregularities or errors upon the trial do not, as a matter of strict right, entitle a party to an order for a new trial. *Clayton v. Yarrington*, 33 Barb. 144; *Clark v. Brooks*, 2 Abb. N. S. 385; S. C., 2 Daly, 159; *Van Tuyl v. Van Tuyl*, 8 Abb. N. S. 5; *Forrest v. Forrest*, 25 N. Y. (11 Smith) 501; *Colie v. Tift*, 47 N. Y. (2 Sick.) 119. But in all cases where the application for a new trial is addressed to the discretion of the court, this discretion ought to be exercised in such a manner as will best answer the ends of justice. *Edmondson v. Machell*, 2 T. R. 4; *Platt v. Munroe*, 34 Barb. 291; *President, eto. v. Patchen*, 8 Wend. 47; *Tyler v. Hoornebeck*, 48 Barb. 197.

Section 2. For irregularities.

a. Want of due notice of trial. Want of due notice of trial is an irregularity sufficient to support a motion for a new trial. *Attorney-General v. Stevens*, 3 Price's Exch. 72; *Lisher v. Parmelee*, 1 Wend. 22; but if the defendant appears and makes a defense, it will be regarded as a waiver of the irregularity. *Thermolin v. Cole*, 2 Salk. 646. See *Jackson v. Marsh*, 1 Cai. 153; and even where the proceedings of the plaintiff are irregular, it is incumbent upon the defendant to make application at the earliest opportunity, after being apprised of the irregularity, or he will be deemed to have waived it. *Hinde v. Tubbs*, 10 Johns. 486; *The New York Ins. Co. v. Kelsey*, 13 How. 535. In determining the sufficiency of the notice of trial, the court will inquire as to whether the attorney or party has been misled by the defect; and for this purpose will not only look to the face of the notice, but to other circumstances, to ascertain whether the opposite party was, in fact, misled by the mistake.

Want of proper jury.

Batten v. Harrison, 3 Bos. & Pul. 1; *Douw v. Rice*, 11 Wend. 178; *Wolfe v. Horton*, 3 Cai. 86; *Bander v. Covill*, 4 Cow. 60. Thus, where the notice of trial was for the third *Tuesday* instead of the third *Monday* of June, the party, in fact, not being misled was held sufficient. *The New York Central Ins. Co. v. Kelsey*, 13 How. 535. See *Bander v. Covill*, 4 Cow. 60; *Wolfe v. Horton*, 3 Cai. 86. See *ante*, 31.

b. Want of proper jury. The selection of a jury when unfairly made is another ground for a motion for a new trial, and is an irregularity arising through the mistake or misconduct of the officer in summoning or impaneling them. The mistake of the officer in such case, however, will not furnish a sufficient ground for setting aside the proceedings where no abuse or injury is pretended, and no objection is made at the time. *Cole v. Perry*, 6 Cow. 584; *Bennett v. Matthews*, 40 id. 428.

It has been held, however, that if a juror has been sworn on the jury by a wrong surname (particularly if he be not the person summoned or intended to be sworn), a new trial may be granted. *Norman v. Beaumont*, Willes, 484; *Wray v. Thorn*, Barnes, 454; *Parker v. Thoroton*, 1 Str. 640. See *Fermor v. Dorrington*, Cro. Eliz. 222, though the rule is otherwise, if the juror be sworn by a wrong christian name. *Hill v. Yates*, 12 East, 231, *n.* And it is in the discretion of the court whether to grant a new trial in such a case or not, the court always refusing to do so where the mistake as to the juror has not been intentional, and productive of injury to the party complaining (*People v. Ransom*, 7 Wend. 417; *Hill v. Yates*, 12 East, 229), provided the juror is otherwise competent. See *The King v. Tremaine*, 7 D. & R. 684, *b.*

A new trial will not be granted on the ground that one of the jurors was an alien, where the objection was not raised and proper challenge made when the jury was drawn. And the parties are concluded, in such case, although the fact forming the objection may not have come to their knowledge until after the trial. *Bennett v. Matthews*, 40 How. 428. See *Seacord v. Burling*, 1 How. 175; *Clark v. Van Vrancken*, 20 Barb. 278; *Borst v. Beecker*, 6 Johns. 332; *Schumaker v. The State*, 5 Wis. 324.

The fact that one of the jurors was related to the successful party in the action, and that they were on terms of friendship and intimacy together, is not sufficient to support a motion for

 Misbehavior of prevailing party.

a new trial. *Onions v. Naish*, 7 Price's Exch. 203. See *Hewitt v. Ferneley*, 7 Price's Exch. 234.

Insanity in a juror is a sufficient reason for a new trial, but it must be fully proved. *State v. Scott*, 1 Hawks. (N. C.) 24.

c. Misbehavior of prevailing party. Another sufficient ground upon which to make application for a new trial is the misbehavior of the prevailing party; as where a party, for whom a verdict is afterward given, delivers to the jury, after they have left the bar, evidence which has not been shown to the court. (*Knight v. Inhabitants of Freeport*, 13 Mass. 218; 1 Burr. Pr. 468); or if he have labored the jury, or used improper influence with them, to induce them to give a verdict in his favor. 2 Chitty's Arch. Pr. 1527; *Blaine's Lessee v. Chambers*, 1 Serg. & Rawle, 169; *Reynolds v. The Champlain Trans. Co.*, 9 How. 7.

Even where handbills, reflecting upon the plaintiff's character, were distributed in court and shown to the jury on the day of trial, a verdict against him was set aside upon application and a new trial granted, although the defendant, by his affidavit, denied all knowledge of the handbills. *Coster v. Merest*, 3 Brod. & B. 272. Merely desiring a juror to attend at the trial of a cause is no ground for a new trial (*Snell v. Timbrell*, 1 Str. 643); and if the jury take a paper which was given in evidence in the cause, with the concurrence of the judge, it is not error. *Howland v. Willetts*, 9 N. Y. (5 Seld.) 170. So, if the jury take a paper with the concurrence of the judge, though without the knowledge of the parties, and, although it may not have been put in evidence, it is not error if it appear either that it was not read or used by them; or that being immaterial in its character, it can be seen from an examination of the whole case that it could not have had any bearing upon the issues or the result. *Schappner v. Second Avenue Railroad Co.*, 55 Barb. 497; *Hackley v. Hastie*, 3 Johns. 252; *Lonsdale v. Brown*, 4 Wash. C. C. 148. See *Gray v. Fisk*, 42 How. 135; S. C., 12 Abb. N. S. 213.

When indirect measures have been resorted to in order to prejudice the jury, or tricks practiced, or unlawful attempts to suppress or stifle evidence, or thwart the proceedings, or to obtain an unconscionable advantage, or to mislead the court and jury, they will be defeated by granting a new trial. *Davis v. Daveril*, 11 Mod. 141; *Barron v. Jackson*, 40 N. H. 365; *Anderson v. George*, 1 Burr. 352; *Eddie v. East India Co.*, 1 Wm. Bla. 296;

Misconduct of jury.

Hewlett v. Cruchley, 5 Taunt. 277; 4 Chitty's Gen. Pr. 59; 2 Bouv. Inst. 292.

d. Misconduct of jury. Any misconduct on the part of a jury in violation of their oaths is a sufficient ground for granting a new trial; as, where they agree upon a verdict by lottery. *Mitchell v. Ehle*, 10 Wend. 595; *Hale v. Cove*, 1 Str. 642; *Donner v. Palmer*, 23 Cal. 40; *Mellish v. Arnold*, Bunb. 51. But, if the jury, in order to ascertain the damages, agree that each juror should set down the sum which he thinks the plaintiff ought to recover, and dividing the aggregate by twelve, they return the quotient as their verdict, this is not a ground for impeaching their verdict, provided there was no previous agreement to be bound by such result. *Dana v. Tucker*, 4 Johns. 487; *Dorr v. Fenno*, 12 Pick. 521; *Cowperthwaite v. Jones*, 2 Dall. 55; *Heath v. Conway*, 1 Bibb, 398; *Grinnell v. Phillips*, 1 Mass. 530; *Johnson v. Perry*, 2 Humph. (Tenn.) 569; *Harvey v. Jones*, 3 id. 157; *Harrison v. McGehee*, 24 Ga. 530; *St. Martin v. Desnoyer*, 1 Minn. 156. Where, beforehand, the jury agreed to be bound by the result, a new trial was granted. *Manix v. Malony*, 7 Iowa, 81; *Elledge v. Todd*, 1 Humph. (Tenn.) 43. See *Thomas v. Dickinson*, 12 N. Y. (2 Kern.) 364. If the jurors, or any of them, eat or drink at the expense of the party for whom they afterward find a verdict, it avoids the verdict and the court will grant a new trial. Co. Litt. 227 b. See *Harebottle v. Placock*, Cro. Jac. 21; *Rex v. Burdett*, 12 Mod. 111; S. C., 2 Salk. 645; 1 Ld. Raym. 148; *Purinton v. Humphreys*, 6 Greenl. 379; *Everett v. Youells*, 4 B. & Ad. 681; *Ned v. State*, 33 Miss. 364. But it is not sufficient ground for a new trial that they eat at their own expense, or at that of the defeated party. *Ib.*; *Commonwealth v. Roby*, 29 Mass. (12 Pick.) 496. And the mere fact that one of the jurors drinks intoxicating liquors during the progress of the trial, it not appearing that in so doing he violates any express direction of the court, or that he drank to excess, is no objection to a verdict. *Wilson v. Abrahams*, 1 Hill, 207; overruling *Brant v. Fowler*, 7 Cow. 562. See *Stone v. The State* 4 Humph. 27; *Rowe v. State*, 11 id. 491; *Pope v. State*, 36 Miss. 121; *Gilmanton v. Ham*, 38 N. H. 108. In order that a verdict may be set aside and a new trial granted on account of the irregular conduct of the jury, it must appear that the party making application has been actually prejudiced thereby (*Oliver v. First Presbyterian Church*, 5 Cow. 283;

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Baker v. Simmons, 29 Barb. 198; and this prejudice must be affirmatively shown. *Hager v. Hager*, 38 Barb. 92. See *Gray v. Fisk*, 42 How. 135; S. C., 12 Abb. N. S. 213.

The separation of the jury, without the consent of the court, is not *per se* sufficient to entitle a party to a new trial. *Anthony v. Smith*, 4 Bosw. 503; *People v. Douglass*, 4 Cow. 26; *Bunn v. Hoyt*, 3 Johns. 255; *Cannon v. The State*, 3 Tex. 31; *Welch v. Welch*, 9 Rich. 33. Neither is it sufficient ground for setting aside a verdict that a juror has attempted to inform the party of the verdict before it was announced in court. *Fash v. Byrnes*, 14 Abb. 12.

Irregularities and misconduct charged against a jury must be stated positively and specifically, and be sustained by oath; and affidavits merely founded on information and belief are not sufficient in such case to set aside a verdict. *Stone v. The State*, 4 Humph. 27.

Section 2. On the merits.

a. In general. Applications for new trials on the merits, in the cases following, are addressed very much to the sound discretion of the court; but, in modern practice, they are liberally granted in furtherance of justice. *Tyler v. Hoornbeck*, 48 Barb. 197; *Platt v. Munroe*, 34 id. 291; *Barrett v. The Third Avenue Railroad Co.*, 45 N. Y. (6 Hand) 628.

It has been decided by the court of appeals, that the supreme court of this State has the undoubted power and right to examine the evidence at large, and upon the whole case, including the law and the facts, to set aside a verdict and grant a new trial (*Macy v. Wheeler*, 30 N. Y. [3 Tiff.] 231; S. C., 18 Abb. 73), and the exercise of this discretionary power in granting a new trial is not reviewable in the court of appeals. *Barrett v. The Third Avenue Railroad Co.*, 45 N. Y. (6 Hand) 628. See *President, etc., of Brooklyn v. Patchen*, 8 Wend. 47; *Hoyt v. Thompson's Ex'rs*, 19 N. Y. (5 Smith) 207.

A new trial cannot be granted in civil cases at the instance of one of several defendants (*Bond v. Spark*, 12 Mod. 275; *Berrington's Case*, 3 Salk. 362; *Parker v. Godin*, 2 Strange, 814); nor for a part only of the cause of action. *Eddie v. East India Co.*, 2 Burr. 1216, 1224; S. C., 1 W. Bla. 298; *Swain v. Hall*, 3 Wils. 45. It has been held, however, that in an action of tort against several, where all have united in the plea of the general issue, there may be a new trial as to one of the defendants, leav-

Absence of party, counsel or witness — Surprise.

ing the verdict undisturbed as to the others. *Seeley v. Chittenden*, 4 How. 265.

b. Absence of party, counsel or witness. The court will sometimes, though rarely, grant a new trial on account of the unavoidable absence of the party, his attorney or witnesses. *Post v. Wright*, 1 Caines, 111; *Sayer v. Finck*, 2 id. 336; *M'Kay v. The Marine Ins. Co.*, id. 384; *Beazley v. Shapleigh*, 1 Price's Exch. 201; *Greatwood v. Sims*, 2 Chitty, 269; *Lee v. Joseph*, 1 Car. & P. 46; *Warren v. Fuzz*, 6 Mod. 22; *Ruggles v. Hall*, 14 Johns. 112; *Tilden v. Gardinier*, 25 Wend. 663.

As a general rule, the absence of a material witness will not be allowed as a ground for a new trial, where the party might, on that account, have moved to put off the trial. *Jackson v. Malin*, 15 Johns. 293; *Alexander v. Byron*, 2 Johns. Cas. 318; *Gilliland v. Morrell*, 1 Caines, 154. And, unless the verdict be manifestly against the justice and equity of the case (*Martyn v. Podger*, 5 Burr. 2631), a new trial will seldom be granted where a verdict has been given against a party, or a plaintiff has been nonsuited, for want of evidence which might have been produced at the trial. *King v. Alberton*, 3 Salk. 391; *Cooke v. Berry*, 1 Wils. 98.

The neglect of the agent or attorney of the party making application is not a sufficient ground for a new trial, the neglect of the attorney or agent being the neglect of the principal. *Patterson v. Matthews*, 3 Bibb, 80; *Barry v. Wilbourne*, 2 Bailey, 91; *Leedom v. Pancake*, 4 Yeates, 183; *Legrاند v. Baker*, 6 Monr. 235, 248. But a new trial may be granted to a party who, although he failed to use due diligence himself, employed a competent agent, who was prevented by unavoidable accident from attending. *Turner v. Booker*, 2 Dana, 334.

The refusal of an application for the postponement of a cause, on the ground of the absence of a material witness, is subject to review, and if erroneous to reversal, as well since as before the constitution of 1846. *Howard v. Freeman*, 3 Abb. N. S. 292; S. C., 7 Rob. 25.

c. Surprise. A new trial may be granted on the ground that the applicant was taken by surprise on the trial; as where a witness, who has been duly subpoenaed, absents himself at the moment of trial, so that the defendant cannot avail himself of the benefit of his testimony. *Tilden v. Gardinier*, 25 Wend. 663; *Ruggles v. Hall*, 14 Johns. 112; *Cotton v. State*, 4 Tex.

 Surprise.

260. So a new trial was granted on the ground of surprise, where the attorney of the plaintiff was subpcnaed, with notice to produce an important document of which he had privately surrendered the control, but did not disclose the fact until the trial. *Jackson v. Warford*, 7 Wend. 62. And where, in an action for seduction, the principal witness swore that the seduction was effected on a specified day not mentioned in the pleadings, and on which day the defendant was able to prove an *alibi* by witnesses who were not present at the trial, a new trial was granted. *Sargent v. Denniston*, 5 Cow. 106. So where, in an action on a promissory note, the plaintiff was surprised by the testimony of the maker that he paid the note at a particular time and place, and was not prepared to meet such testimony ; and no time or opportunity was given at the trial to obtain opposing evidence, it was held that new and material evidence contradicting the testimony as to payment was sufficient ground for a new trial. *Parshall v. Klinck*, 43 Barb. 203. See *Watterson v. Watterson*, 1 Head, 1 ; *Riley v. Emerson*, 5 N. H. 531 ; *Crafts v. Union Mutual Fire Ins. Co.*, 36 id. 44.

A motion for a new trial, however, will not be granted on the ground of surprise, when the point on which the alleged surprise took place was one that might have been reasonably anticipated. *De Leyer v. Michaelis*, 5 Abb. 203 ; or, where the party was aware beforehand that the evidence complained of would, in fact, be given. *Meakim v. Anderson*, 11 Barb. 215 ; *Gardner v. Ryerson*, 19 How. 108. Nor will a new trial be granted on the ground that the plaintiff was surprised at the defense set up. *Jackson v. Roe*, 9 Johns. 77. See *People v. Marks*, 10 How. 261 ; S. C., 2 Park. 673. Nor on the ground that proof, expected to be made by one witness, was in fact given by another, or with a view to impeach a witness. *Beach v. Tooker*, 10 How. 297. Nor will the fact that the party has been led to believe that certain facts material to the defense would be admitted, or not disputed, and thus induced not to introduce evidence, be sufficient ground for a new trial. So long as the conduct of the opposite party and his counsel in the matter is free from fraud or positive stipulation, the court will not interfere. *Taylor v. Harlow*, 11 How. 285. Surprise of counsel at the testimony of a witness is not of itself any ground for a new trial. *Sproul v. Resolute Fire Ins. Co.*, 1 Lans. 71.

It has been observed that surprise is sufficient ground for a

new trial in but few cases, such as the sudden and unexpected departure of a witness from the court; unexpectedly adverse testimony of a party's own witness, and, in some cases, any unexpected testimony, and, generally, any situation in which a party may be placed, without his default, and injuriously to his interests. *Oakley v. Sears*, 7 Rob. 111.

Where a party, claiming to have been surprised by the testimony of his own witness, makes application for a new trial, on the ground of surprise, he should produce the affidavits of other persons for the purpose of showing his ability to establish a different case by them. *Phoenix v. Baldwin*, 14 Wend. 62. See *Gray v. Durland*, 50 Barb. 211.

In all cases the surprise complained of must be on some matter of fact and not of law. *Craig v. Fanning*, 6 How. 336.

d. Verdict against law. Where the verdict is against law, a new trial will be granted. *Stevens v. Munn*, 19 Wend. 181; *Tinson v. Welch*, 7 Rob. 392. And this is the rule, although there be no misdirection by the judge. *Gregory v. Tuffs*, 1 Crom., M. & Rosc. 310. It has been held, however, that where, in the opinion of the court, substantial justice has been done between the parties, although the law arising from the evidence would have justified a different result, a new trial will not be granted. *Smith v. Shultz*, 2 Ill. 490. See *Marr v. Johnson*, 9 Yerg. (Tenn.) 1.

Where, on a second trial, the jury render a verdict contrary to the rule of law decided by the court in granting a new trial, a third trial will be ordered. *Wilkie v. Roosevelt*, 3 Johns. Cas. 206; *Silva v. Low*, 1 id. 336.

e. Verdict against evidence. If the jury find a verdict against the weight of evidence, the court will, in general, grant a new trial. *Conrad v. Williams*, 6 Hill, 444; *Townsend Manufacturing Co. v. Foster*, 51 Barb. 346; S. C. affirmed, 41 N. Y. (2 Hand) 620 n; *Eldridge v. Reed*, 2 Sweeny, 155; *Dickson v. Broadway and Seventh Avenue R. R.*, 42 N. Y. (2 Sick.) 507. So, whenever there is good reason for believing that a referee has mistaken the import and preponderance of the evidence given on the trial, and it is evident that injustice has been done, the judgment entered upon his report will be set aside and a new trial granted. *Townsend Manufacturing Co. v. Foster*, 51 Barb. 346.

In all cases, however, it must clearly appear that the verdict

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or decision was against the weight of evidence. *People v. Townsend*, 37 Barb. 520; *Williams v. Vanderbilt*, 29 id. 491, 504; *Fleming v. Hollenback*, 7 id. 271; *Stoddard v. Long Island R. R. Co.*, 5 Sandf. 180; and especially upon a question of fraud (*People v. Townsend*, 37 Barb. 520, *Ynguanzo v. Salomon*, 3 Daly, 153), or, where the verdict is against a claim for a forfeiture, as, for example, a defense of usury. *Rice v. Welling*, 5 Wend. 595; *Mansfield v. Wheeler*, 23 id. 79. But where the verdict is in favor of such a claim, it is not so favored. *East River Bank v. Hoyt*, 22 How. 478.

The verdict of a jury should be set aside in every case where there is *no* evidence to sustain it, or it is against the clear and decided weight of the evidence (*Rathbone v. Stanton*, 6 Barb. 141; *Smith v. Tiffany*, 36 id. 23. See *Mumford v. Smith*, 1 Caines, 520; *Lyle v. Rollins*, 25 Cal. 437; *Purvis v. Coleman*, 1 Bosw. 321; *State v. Hill*, 48 Me. 241; *Baker v. Bonesteel*, 2 Hilt. 397); or, whenever the evidence is not *sufficient* to authorize or sustain it. *Sheldon v. Hudson River R. R. Co.*, 29 Barb. 226. But a verdict will not be disturbed where the evidence was not strong, or merely because the court would have come to a different conclusion from that of the jury, on the force and weight of the testimony. *Polhamus v. Moser*, 7 Rob. 489; *Williams v. Vanderbilt*, 29 Barb. 491; *Mackey v. New York Central R. R. Co.*, 27 id. 528; *Fleming v. Smith*, 44 id. 554; *Doe v. Roe*, 28 Ga. 484. And, after two concurring verdicts in a case where there are many witnesses and much testimony on both sides upon a mere question of fact, and there is no misdirection of the jury, a new trial will not be granted, although the court may be of opinion that the verdict is against the weight of evidence. *Talcot v. Commercial Insurance Co.*, 2 Johns. 467; *Fowler v. Aetna Insurance Co.*, 7 Wend. 270.

In penal actions a new trial is never granted in favor of the plaintiff, merely on the ground that the verdict is against the weight of evidence (*Baker v. Richardson*, 1 Cow. 77; *Overseers of Rochester v. Lunt*, 15 Wend. 565; *Wheeler v. Calkins*, 17 How. 451; *The East River Bank v. Hoyt*, 22 id. 478); or even against uncontradicted evidence. *Ranston v. Etteridge*, 2 Chit. 273; *Comfort v. Thompson*, 10 Johns. 101. So, in slander, actions for a libel, and other actions vindictive in their nature, a verdict for the defendant will not be set aside on the ground that it is against the weight of evidence (*Ex parte Baily*, 2 Cow.

Verdict against evidence — Perverse verdict — Error in charge.

479; *Paddock v. Salisbury*, id. 811; *Rundell v. Butler*, 10 Wend. 119; *Jarvis v. Hatheway*, 3 Johns. 180; *Hurtin v. Hopkins*, 9 id. 36; unless it be clearly the result of prejudice, partiality, or corruption, in which case the verdict should be set aside and a new trial granted. See *Levi v. Milne*, 4 Bing. 195; *Rundell v. Butler*, 10 Wend. 119.

As a general rule, wherever, on a disputed question of fact, there is a conflict of testimony, the preponderance must be overwhelming to induce a court to disturb the finding either of a jury, or of a justice who tries the case without a jury. *Morss v. Sherrill*, 63 Barb. 21; *Board of Commissioners of Excise of Onondaga County v. Backus*, 29 How. 33. See *Fry v. Bennett*, 9 Abb. 45; S. C., 3 Bosw. 200; S. C. affirmed, 28 N. Y. (1 Tiff.) 324; *Strong v. Blake*, 46 Barb. 227; *Reynolds v. Kelly*, 1 Daly, 283; *Arnoux v. Homans*, 25 How. 427. And although there may be cases in which the ends of justice demand that the court should possess the power to correct *abuses* committed by a panel of jurors, that power should be limited by reasonable rules. It must be an abuse; it must be such a verdict as evinces that it was the result of passion, prejudice, mistake or corruption; such a verdict as shocks the common judgment; or such as is without evidence to support it, or is so against the striking preponderance of evidence that a common exercise of judgment demands its reversal. *Polhamus v. Moser*, 7 Rob. 489; *Morss v. Sherrill*, 63 Barb. 21. See *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. (6 Hand) 628. And the finding of facts by a referee, where there is a conflict of evidence, is as conclusive as the verdict of a jury. *Smith v. McCluskey*, 45 Barb. 610. See *Eschbaugh v. The Syracuse Distilling, etc., Co.*, 27 How. 125.

f. Perverse verdict. The verdict will be set aside, and a new trial granted, where a jury perversely disregard the explicit directions of the court, given to them in the charge. *Clark v. Richards*, 3 E. D. Smith, 89; *Ayres v. O'Farrell*, 4 Rob. 668. And this rule applies whether the charge was correct or not, where it has not been excepted to, inasmuch as the unsuccessful party is thereby deprived of the opportunity of excepting. *Rogers v. Murray*, 3 Bosw. 357. See *Stevens v. Hauser*, 1 Abb. N. S. 391, 394.

g. Error in charge. A new trial may also be granted where the judge has erroneously charged or misdirected the jury (*Benedict v. Johnson*, 2 Lans. 94; *Hicks v. Foster*, 13 Barb. 663; *Coyle*

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v. *City of Brooklyn*, 53 id. 41, 62; *Carnes v. Platt*, 6 Rob. 270); even though it is not improbable that the jury would have decided it the same way under a proper charge (*Highland Bank v. Wynkoop*, Hill & Denio, 243); and even where the verdict found is warranted by the evidence, a new trial will be granted if the chances are equal that it resulted from the misdirection. *Wardell v. Hughes*, 3 Wend. 418. See *Castanos v. Ritter*, 3 Duer, 370; *Sayre v. Townsends*, 15 Wend. 647; *Palmer v. Andrews*, 7 id. 142. And so a new trial should be granted even though the charge was susceptible of a construction consistent with the law, if, from its indefinite meaning, it was calculated to mislead the jury on a vital point. *Harding v. Barney*, 7 Bosw. 353. And if questions are submitted to the jury by the judge, concerning which there is no evidence, a new trial will be granted. *Dolsen v. Arnold*, 10 How. 528; *Castanos v. Ritter*, 3 Duer, 370; *Small v. Smith*, 1 Denio, 583; *Storey v. Brennan*, 15 N. Y. (1 Smith) 524; *Harris v. Wilson*, 1 Wend. 511. And so if a question is taken from the jury which ought to be submitted to them (*Schuchardt v. Allens*, 1 Wall. 359; *Utica Ins. Co. v. Badger*, 3 Wend. 102. See *Carnes v. Platt*, 6 Rob. 270); or if a question is submitted without proper instructions. *Marston v. Vultee*, 12 Abb. 143; S. C., 8 Bosw. 129.

A new trial, however, will not be granted on account of the misdirection of the judge, where the verdict has in nowise been affected by it, and no injury has thereby been brought about to the losing party. *Depeyster v. Columbian Ins. Co.*, 2 Cai. 85; *Dean v. Hewitt*, 5 Wend. 257; *Jackson v. Timmerman*, 12 id. 299; *Holdane v. Butterworth*, 5 Bosw. 1; *Alston v. Jones*, 17 Barb. 277; *Munroe v. Potter*, 22 How. 49; S. C., 34 Barb. 358; *Mansfield v. Wheeler*, 23 Wend. 79; *Potter v. Hopkins*, 25 id. 417; *Deems v. Crook*, 1 Edm. 95. But it is for the successful party to show that no injury could possibly have resulted from the error. *Greene v. White*, 37 N. Y. (10 Tiff.) 405; S. C., 4 Trans. App. 382.

A new trial will not be granted because the judge charged the jury that, in his opinion, there is not sufficient evidence to establish a certain fact, when at the same time he instructs the jury to consider the evidence and to decide as they shall find the truth to be. *Gardner v. Pickett*, 19 Wend. 186. See *McKee v. People*, 36 N. Y. (9 Tiff.) 113; S. C., 1 Trans. App. 1; 34 How. 230. Nor will a new trial be granted for matters suggested in a charge not

 Refusal to charge — Granting nonsuit — Refusing to nonsuit.

pertinent to the case, unless the attention of the judge is at the time called to such suggestions and he refuses to explain. *Ib.* See *Lansing v. Russell*, 13 Barb. 510; *Jackson v. Timmerman*, 12 Wend. 299; *Petty v. Anderson*, 3 Bing. 170; *Davidson v. Stanley*, 2 Man. & Gr. 221. And even a recommendation to find a particular verdict is not sufficient ground for a new trial, where the evidence warrants the verdict and the jury are left at liberty to decide. *Dean v. Hewitt*, 5 Wend. 257.

Misapprehension of the judge as to material facts, and a direction to the jury accordingly, are irresistible reasons for a new trial. *Cannon v. Alsbury*, 1 A. K. Marsh. 76.

h. Refusal to charge. When the judge, after being so requested, has refused to charge upon any important point, a new trial will be granted. *Hill v. Beebe*, 13 N. Y. (3 Kern.) 556; *Walter v. Post*, 6 Duer, 363; S. C., 4 Abb. 382. But where the attention of the court has not been expressly called to the point in respect to which the jury should properly be instructed, his omission to give the proper instructions will not be a ground for a new trial. *Atlantic Dock Co. v. City of Brooklyn*, 3 Keyes, 444; S. C., 3 Trans. App. 305; *Parsons v. Brown*, 15 Barb. 590; *Graser v. Stellwagen*, 25 N. Y. (11 Smith) 315. A judge at the trial is not bound, without the request of parties, to give any instructions to the jury. *Haupt v. Pohlmann*, 1 Rob. 121; S. C., 16 Abb. 301. See *ante*, p. .

i. Granting nonsuit. Whenever the judge at the circuit has granted a nonsuit in a case where the questions of fact involved in the issues should properly have been left to the jury for determination, the appellate court will reverse the judgment and grant a new trial. *Rider v. Pond*, 19 N. Y. (5 Smith) 262; *Silliman v. Lewis*, 49 N. Y. (4 Sick.) 379; *Radway v. Briggs*, 37 N. Y. (10 Tiff.) 256; S. C., 35 How. 422; 4 Trans. App. 98; *Coykendall v. Eaton*, 37 How. 438; S. C., 55 Barb. 188; *Ernst v. Hudson River R. R. Co.*, 35 N. Y. (8 Tiff.) 9; S. C., 32 How. 61; 3 Abb. N. S. 82.

The cases in which the granting of a nonsuit will be error, and the mode of presenting the question for review, have been sufficiently discussed elsewhere.

j. Refusing to nonsuit. The denial of a motion for a nonsuit does not necessarily imply that the plaintiff is entitled to a verdict upon the proof as it stands, but simply asserts that the evidence adduced is of such a character as to cause the

 Refusing to nonsuit — Admitting improper evidence.

decision of the questions of fact involved to fall within the province of the jury. *Ross v. Mayor, etc., of New York*, 4 Rob. 49.

Whenever the judge at the circuit erroneously decides that the evidence adduced is of such a character, the appellate court will, as a general rule, correct the error by ordering a new trial. See *Dascomb v. Buffalo & State Line R. R. Co.*, 27 Barb. 221; *Lomer v. Meeker*, 25 N. Y. (11 Smith) 361; *Robinson v. McManus*, 4 Lans. 380; *Carpenter v. Smith*, 10 Barb. 663. The rule is well settled that the right to nonsuit and the duty to nonsuit are correlative. *Ib.*

The cases in which the judge at the circuit may properly grant or refuse to grant a nonsuit have been pointed out in a preceding chapter. See Trial by Jury, *ante*, p. 158 to 165.

The general principle must not, however, be overlooked, that where the defendant moves for a nonsuit on the ground of insufficiency of proof, and the motion is improperly denied, the defeated party will not be entitled to a new trial, if at a subsequent stage of the trial the defect in proof is supplied. *Robert v. Good*, 36 N. Y. (9 Tiff.) 408; S. C., 2 Trans. App. 103; *Schenectady & Saratoga Plank Road Co. v. Thatcher*, 11 N. Y. (1 Kern.) 102; *Morgan v. Reid*, 7 Abb. 215; *Kent v. Harcourt*, 33 Barb. 491; *Schwerin v. McKie*, 5 Rob. 404; *Barrick v. Austin*, 21 Barb. 241; *Mayor, etc., New York v. Mason*, 1 Abb. 344; S. C., 4 E. D. Smith, 142; *Breidert v. Vincent*, 1 id. 542; *Colegrove v. Harlem & New Haven R. R. Co.*, 6 Duer, 382; *Colvin v. Burnet*, 2 Hill, 620.

A verdict will be set aside and a new trial granted on the ground of an erroneous disregard of a material variance. *Salters v. Genin*, 3 Bosw. 250; S. C., 7 Abb. 193; *Catlin v. Hansen*, 1 Duer, 309; *Johnson v. McIntosh*, 31 Barb. 267; *Texier v. Gouin*, 5 Duer, 389. And, on the other hand, an omission to disregard, or to grant an amendment in respect of a variance wholly immaterial, is sufficient ground for a new trial. *Rogers v. Verona*, 1 Bosw. 417; *Willis v. Orser*, 6 Duer, 322.

k. Admitting improper evidence. A new trial will be granted where improper testimony, which may have influenced the verdict of the jury, has been received under exception on the trial. *Baird v. Gillett*, 47 N. Y. (2 Sick.) 186; *Clark v. Vorce*, 19 Wend. 232; *Ellis v. Short*, 21 Pick. 142; *Buddington v. Shearer*, 22 id. 427; *Anthoine v. Coit*, 2 Hall, 40; *Gillet v. Mead*, 7 Wend.

Admitting improper evidence.

193; *Farmers' Bank v. Whinfield*, 24 id. 419; *Clark v. Crandall*, 3 Barb. 612; *Dresser v. Ainsworth*, 9 id. 619; *Boyle v. Colman*, 13 id. 42; *Williams v. Fitch*, 18 N. Y. (4 Smith) 546; *Erben v. Lorillard*, 19 N. Y. (5 Smith) 299; *Wilson v. Wilson*, 4 Keyes, 413. See *Osgood v. Manhattan Co.*, 3 Cow. 612; *Marquand v. Webb*, 16 Johns. 89.

If improper evidence be given upon the trial, although it may be merely cumulative, it will be a ground for the reversal of the judgment. *Osgood v. Manhattan Co.*, 3 Cow. 612; *Baird v. Gillett*, 47 N. Y. (2 Sick.) 186. It has been held, however, that, though the admission of improper evidence was objected to, a new trial would be denied, unless there should be strong probable grounds for believing the merits had not been fully and fairly tried, and that injustice had been done. *Depeyster v. Columbia Ins. Co.*, 2 Cai. 85; *Crary v. Sprague*, 12 Wend. 41; *Northrop v. Wright*, 24 id. 221. See *Forrest v. Forrest*, 25 N. Y. (11 Smith) 501. But see *Jaeger v. Kelly*, 7 Rob. 586.

In equitable actions the strictness of the rule is relaxed, and where the error complained of was the admission of improper testimony, a new trial will not be ordered, unless the court, taking the whole of the evidence together and connecting it with the judge's charge, thinks that injustice has been done by the error committed, and is dissatisfied with the verdict. *Apthorp v. Comstock*, 2 Paige, 482; *Mulock v. Mulock*, 1 Edw. Ch. 14; *Patterson v. Ackerson*, id. 96; *Lansing v. Russell*, 13 Barb. 520; *Clayton v. Yarrington*, 33 id. 144; *Forrest v. Forrest*, 25 N. Y. (11 Smith) 501, 512; *Sutherland v. Rose*, 47 Barb. 144; *Clark v. Brooks*, 2 Abb. N. S. 385; S. C., 2 Daly, 159; *Tatham v. Wright*, 2 Rus. & Myl. 1; *O'Connor v. Cook*, 8 Ves. 535; *Warden of St. Paul's v. Morris*, 9 id. 165; *Pemberton v. Pemberton*, 11 id. 50; *Bootle v. Blundell*, 19 id. 494, 503.

The admission of improper evidence, which could not have varied the result of the action, is not ground for a new trial. *Worrall v. Parmelee*, 1 N. Y. (1 Comst.) 519; *Smith v. Kerr*, 1 Edm. 190; *Barton v. City of Syracuse*, 37 Barb. 292; S. C. affirmed, 36 N. Y. (9 Tiff.) 54; S. C., 1 Trans. App. 317; *Lowery v. Steward*, 3 Bosw. 505; S. C. affirmed, 25 N. Y. (11 Smith) 239; *Klock v. Buell*, 56 Barb. 398. Neither will the admission of improper testimony, in relation to a particular fact, but which fact is immaterial to the issue, furnish sufficient cause for a new trial. *Lamb v. Camden & Amboy Railroad Co.*, 2 Daly, 454;

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Kimberlin v. Faris, 5 Dana, 533; *Barry v. Bennett*, 7 Metc. (Mass.) 354; *Ahern v. Standard Life Ins. Co.*, 2 Sweeny, 441; *Watson v. Lisbon Bridge*, 2 Shep. 201. See *Wilson v. Wilson*, 4 Keyes, 413.

And an error in the admission of improper evidence may be disregarded where proper evidence is afterward introduced to prove the same facts, or the facts themselves are admitted by the pleadings. *Castree v. Gavelle*, 4 E. D. Smith, 425.

l. Rejecting proper evidence. The refusal of the judge to admit a *witness* or *evidence* upon any material question, after the right to submit the same has been properly urged on the trial, is also ground for a new trial. *Robison v. Lyle*, 10 Barb. 512; *Mills v. Carnly*, 1 Bosw. 159; *McDougall v. Fogg*, 2 id. 387. See *Snell v. Loucks*, 12 Barb. 385; *Ayres v. O'Farrell*, 4 Rob. 668. But a new trial will not be granted for the refusal of the judge to admit a question which was not shown to be relevant (*Dodge v. New York & Washington Steamship Co.*, 37 How. 524; S. C., 6 Abb. N. S. 451; 1 Sweeny, 453; *Fairchild v. Chase*, 24 Wend. 381); nor for the rejection of evidence which, if it had been admitted, would not have altered the case, or established any fact not already proved by other means. *Alexander v. Barker*, 2 Tyr. 140; *Hunt v. Bennett*, 4 E. D. Smith, 647; or if the court, judging upon the whole record, is satisfied that the verdict is right. *Pemberton v. Pemberton*, 11 Ves. 52; *Bootle v. Blundell*, 19 id. 503. See *Sprague v. Eccleston*, 1 Lans. 74.

But, when evidence has been improperly rejected, and the judgment is sought to be sustained on the ground that the facts established by the verdict show that the evidence, if admitted, would not have changed the result, it must appear that such is *necessarily* the effect of the verdict; not that the jury *might*, but that they *must*, have found as claimed. *Starbird v. Barrons*, 43 N. Y. (4 Hand) 200.

Neither will a new trial be granted on the ground that evidence was improperly excluded, where at another stage of the trial conclusive evidence upon the same point was admitted, and the party receives no injury from the exclusion. *Park Bank v. Tilton*, 15 Abb. 384. But, if the evidence under the general issue is competent for *any* purpose, although inadmissible for other purposes in the action, its exclusion is error, and a new trial will be granted. *Button v. McCauley*, 5 Abb. N. S. 29; S. C., 4 Trans. App. 447; reversing S. C., 38 Barb. 413.

Excessive damages.

The same rules, as to the admission or rejection of evidence, are likewise applicable when the trial is by the court or referees, and a new trial will be granted on application of the party injured, if an important error of the nature indicated has been committed. See *Demelt v. Leonard*, 19 How. 182; *Stanton v. Wetherwax*, 16 Barb. 259; *Belden v. Nicolay*, 4 E. D. Smith, 14; *Hahn v. Van Doren*, 1 id. 411; *Williams v. Fitch*, 18 N. Y. (4 Smith) 546; *Brown v. Colie*, 1 E. D. Smith, 265; *Johnson v. McIntosh*, 31 Barb. 267; *The Rippowam Co. v. Strong*, 2 Hilt. 52; *Belmont v. Coleman*, 1 Bosw. 188; S. C. affirmed, 21 N. Y. (7 Smith) 96; *Gellatly v. Lowery*, 6 Bosw. 113; *Barry v. Galvin*, 37 How. 310.

m. Excessive damages. Although, as a general rule, the verdict of a jury on a question of damages is conclusive, yet the court may, in any case, and frequently does in actions other than for personal or willful injuries, grant a new trial upon the ground of excessive damages. *Sherry v. Frecking*, 4 Duer, 452; *Finch v. Brown*, 13 Wend. 601; *Moadinger v. Mechanics' Fire Ins. Co.*, 2 Hall, 490; *Collins v. Albany & Schenectady Railroad Co.*, 12 Barb. 492; *Hewlett v. Cruchley*, 5 Taunt. 277; *Jones v. Sparrow*, 5 T. R. 257; *Ducker v. Wood*, 1 id. 277; *Cassin v. Delany*, 6 Abb. N. S. 1; S. C., 38 N. Y. (11 Tiff.) 178.

But, in actions for personal injuries, the courts will closely scrutinize the circumstances, and unless it clearly appear that the jury committed some gross and palpable error, or acted under some improper bias, inference or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated, a new trial will not be granted on this ground. *Collins v. Albany & Schenectady Railroad Co.*, 12 Barb. 492; *Clapp v. The Hudson River Railroad Co.*, 19 id. 461; *Murray v. The Hudson River Railroad Co.*, 47 id. 196; 48 N. Y. (3 Sick.) 655. Where, however, it clearly appears, in such cases, that the damages are excessive, a new trial will be granted. *Ib.* See *Cassin v. Delany*, 6 Trans. App. 199; S. C., 38 N. Y. (11 Tiff.) 178; 6 Abb. N. S. 1.

In actions for willful injuries, involving moral delinquency on the part of the defendant, the cases are still more rare in which a second trial has been ordered on the ground of excessive damages. Such are actions for libel: *Fry v. Bennett*, 3 Bosw. 200; S. C., 9 Abb. 45; S. C. affirmed, 28 N. Y. (1 Tiff.) 324; *Coleman v. Southwick*, 9 Johns. 45; *Southwick v. Stevens*, 10 id. 443; *Root v. King*, 7 Cow. 613. Slander: *Cole v. Perry*, 8 Cow. 214;

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Moody v. Baker, 5 id. 351; *Ryckman v. Parkins*, 9 Wend. 470; *Ostrom v. Calkins*, 5 id. 263; *Douglass v. Tousey*, 2 id. 352. Malicious prosecution: *Marquissee v. Ormston*, 15 Wend. 368; *Bump v. Betts*, 23 id. 85. Or, assault and battery: *Blum v. Higgins*, 1 Hilt. 147; S. C., 3 Abb. 104; *M'Connell v. Hampton*, 12 Johns. 234.

In such cases, other elements besides mere compensation for the injury sustained by the plaintiff may properly enter into the verdict. The jury are allowed, and even advised, to consider what the interests of society, as well as justice to the plaintiff, require; and, by their verdict, to punish the offender, as well as make compensation for the injury; and, unless the verdict is so extravagant as to excite a suspicion that the jury have been controlled by improper influences, the court will not interfere. Justice HARRIS, in *Collins v. The Albany & Schenectady Railroad Co.*, 12 Barb. 492. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line, for they have no standard by which to ascertain the excess. *Coleman v. Southwick*, 9 Johns. 45.

A new trial will not be granted in an action for crim. con. or seduction, merely because the damages appear to the court to be excessive; but the court must be satisfied that the jury acted under the influence of undue motives, or of gross error or misconception on the subject. *Bennett v. Allcott*, 2 T. R. 166; *Chambers v. Caulfield*, 6 East, 245; *Duberley v. Gunning*, 4, T. R. 651; *Travis v. Barger*, 24 Barb. 614; *Ingerson v. Miller*, 47 id. 47. See, also, *Smith v. Masten*, 15 Wend. 270; *Mulvehall v. Millward*, 11 N. Y. (1 Kern.) 343; *Dain v. Wycoff*, 7 N. Y. (3 Seld.) 191; *Moran v. Daves*, 4 Cow. 412.

In *Sargent v. Denniston*, 5 Cow. 106, the court refused to interfere with the verdict on account of excessive damages, although it was conceded by the plaintiff's counsel that there was no seduction, the court saying that the damages were not so flagrantly outrageous and extravagant as necessarily to evince intemperance, passion, partiality or corruption on the part of the jury; and that, where that is not the case, the court will not undertake to set their judgment on a question of damages, in an action of this nature, in opposition to the judgment of the jury.

So in an action for enticing away the plaintiff's wife, the court will not grant a new trial on the ground that the damages given by the verdict are excessive, the amount of damages awarded

Inadequate damages.

not being conclusive evidence on that point, unless facts appear showing that the jury were actuated by improper motives. *Scherpf v. Szadeczky*, 4 E. D. Smith, 110; S. C., 1 Abb. 366.

In actions for breach of promise of marriage, and especially if accompanied with seduction, the courts are equally cautious about interfering with the verdict on the ground of excessive damages, and a new trial will not be granted unless it clearly appears that the jury acted under prejudice, partiality or gross ignorance or disregard of their duty. *Fidler v. McKinley*, 21 Ill. 308; *Waters v. Bristol*, 26 Conn. 398. Thus, a verdict of \$5,000 for breach of promise, coupled with seduction, was not held to be so excessive as to justify reversal. *Goodall v. Thurman*, 1 Head (Tenn.), 209.

In some cases, where the damages are deemed by the court to be excessive, a new trial will be granted, unless the plaintiff will stipulate to remit a specified portion of the damages assessed. *Murphy v. The Hudson River R. R. Co.*, 47 Barb. 196; 48 N. Y. (3 Sick.) 655; *Clapp v. Hudson River R. R.*, 19 id. 461; *Diblin v. Murray*, 3 Sandf. 19; *Potter v. Thompson*, 22 Barb. 87; *Collins v. Albany & Schenectady R. R.*, 12 id. 492.

n. Inadequate damages. The instances in which a new trial has been granted on this ground are of rare occurrence; but a verdict for a grossly inadequate amount stands upon no higher ground in legal principle, nor in the rules of law or justice, than a verdict for an excessive or extravagant amount, and the power of the court to grant a new trial, where the damages are inadequate, is undoubted. *Richards v. Sandford*, 2 E. D. Smith, 349; S. C., 12 N. Y. Leg. Obs. 94; *Collins v. Albany & Schenectady R. R. Co.*, 12 Barb. 492; *Robbins v. Hudson River R. R.*, 7 Bosw. 1; *McDonald v. Walter*, 40 N. Y. (1 Hand) 551. Thus, in an action for the defendant's negligence, whereby the plaintiff sustained severe bruises and lost a tooth, a verdict for the plaintiff for \$10 only was held to be grossly inadequate, and a new trial was granted. *Richards v. Sandford*, 2 E. D. Smith, 349; S. C., 12 N. Y. Leg. Obs. 94. So where the verdict was for the plaintiff, with one farthing damages for a broken leg, a new trial was granted. *Armytage v. Haley*, 4 Q. B. 917.

A new trial will not, however, be granted in every case in which the damages awarded are too small to fully compensate the plaintiff for the injury sustained. See *Apps v. Day*, 14 C. B. 112; *Bradlaugh v. Edwards*, 11 C. B. N. S. 377. And, instead of

Perjured evidence.

granting a new trial absolutely, the court will sometimes direct a new trial, unless the defendant should consent to a specified increase in the amount of damages found. *Richards v. Sandford*, 2 E. D. Smith, 349; S. C., 12 N. Y. Leg. Obs. 94; *Armystage v. Haley*, 4 Q. B. 917. This practice should, however, be adopted only in a clear case. *James v. Morey*, 44 Ill. 352; *Carr v. Miner*, 42 id. 180.

It has been held that the Code does not permit a motion for a new trial, on the ground of inadequate damages, to be heard upon the judge's minutes. *Moore v. Wood*, 19 How. 405. But, in a late case in the court of appeals (*McDonald v. Walter*, 40 N. Y. [1 Hand] 551), the judge who presided, upon a motion made upon his minutes, granted an order setting the verdict aside and awarding a new trial, on this ground; and it was held, that he had the jurisdiction and the right to make such order, and this, although upon the evidence a verdict for the defendants would not have been disturbed.

o. Perjured evidence. A new trial will be granted if the witnesses on whose testimony the verdict was obtained have since been convicted of perjury. *Petrie v. Milles*, 3 Dougl. 27; *Benfield v. Petrie*, id. 24; *Allen v. Young*, 6 Monr. 136; *Great Falls Manuf. Co. v. Mathes*, 5 N. H. 574. But the mere finding of an indictment for perjury before conviction is not sufficient (*Seeley v. Mayhew*, 4 Bing. 561. See *Pott v. Parker*, 2 Chit. 269), though the court will, in some instances, stay the proceedings until such indictment has been tried. *Benfield v. Petrie*, 3 Dougl. 24; Tidd. Pr. 907.

So a new trial will be granted where the testimony of witnesses on which a verdict has proceeded be founded on and derive its credit from particular circumstances, and those circumstances be afterward clearly falsified by affidavit. *Lister v. Mundell*, 1 B. & P. 427. And if subornation of witnesses have been discovered since the former trial, a new trial will be awarded. *Fabrilus v. Cock*, 3 Burr. 1771.

An affidavit by the defendant that the plaintiff's witnesses had been guilty of perjury, is held not to be sufficient ground for a new trial in an action for an assault. *Proctor v. Simmons*, 9 Moore, 581. Neither is it a sufficient ground for a new trial, that a witness having testified that the character for truth of another witness was not good, admitted, on cross-examination, that, at a

former period, he had declared that his character was good. *Treat v. Browning*, 4 Conn. 408.

p. Error in giving evidence. Where it clearly appears that a witness has fallen into a mistake in giving his testimony upon a material point, and the circumstances of the case are such as to render it probable that the mistake of the witness had the effect of turning the verdict of the jury, a new trial will be granted. *Richardson v. Fisher*, 7 Moore, 546; S. C., 1 Bing. 145; *Coddington v. Hunt*, 6 Hill, 595; *Hewey v. Nourse*, 54 Me. 256. Thus, where a plaintiff was nonsuited, because, as appeared by the defendant's evidence, an agreement contained more than the proper number of words for the stamp it bore; but it afterward turned out that the witness called at the trial had miscounted the number of words, a new trial was granted on affidavit of that fact. *Dudley v. Robins*, 3 C. & P. 26.

Where, however, the testimony of a witness, who was mistaken, is merely cumulative, a new trial will not be granted. *Mersereau v. Pearsall*, 6 How. 293. And the mere contradiction of witnesses is not of itself sufficient ground for a new trial, even though the judge directed the jury contrary to their finding. *Sprague v. Michell*, 2 Chit. 271. Nor is the affidavit of one party contradicting the witnesses on the other side alone sufficient. *Feise v. Parkinson*, 4 Taunt. 640.

In an action against one as joint maker of a promissory note, where the defense of forgery was set up by the defendant, a new trial was granted on the ground that the note, which at the time of the trial was lost and could not be produced, had since been found. *Platt v. Munroe*, 34 Barb. 291.

q. Error in exercise of discretion. A new trial may be granted, where, upon an examination of the whole case, it appears that the judge has improperly exercised his discretion to the prejudice of either party to the action. Thus, a new trial was granted on the ground of the improper refusal by the judge to permit the introduction of new and material evidence after the case had been closed. *Mercer v. Sayre*, 7 Johns. 306. The cases, however, in which the court will interfere on this ground, are exceedingly rare; the application in most instances being denied. *Ford v. Niles*, 1 Hill, 300; *Meakim v. Anderson*, 11 Barb. 215; *Sheldon v. Wood*, 2 Bosw. 267. And, in general, a questionable exercise of discretion on the part of the judge constitutes no ground for a new trial where no positive legal right is violated.

Newly-discovered evidence.

Anthony v. Smith, 4 Bosw. 503; *Cheaney v. Arnold*, 18 Barb. 434; *Henry v. Lowell*, 16 id. 268; *Peck v. Richmond*, 2 E. D. Smith, 380; *Chancel v. Barclay*, 1 id. 384; *Silverman v. Foreman*, 3 id. 322; *Stacy v. Graham*, 3 Duer, 444; *St. John v. Northrup*, 23 Barb. 25.

r. Newly-discovered evidence. Another ground upon which application may be made for a new trial is, that new and material evidence has been discovered since the trial; but the application will be granted only in accordance with the following well-established principles thus stated in *Seeley v. Chittenden*, 4 How. 265. See, also, *People v. Superior Court of New York*, 5 Wend. 114; S. C. affirmed, 10 id. 286; *Jackson v. Malin*, 15 Johns. 293; *Vandervoort v. Smith*, 2 Cai. 155; *Parshall v. Klinck*, 43 Barb. 203.

1. The testimony must have been discovered since the former trial.

2. It must appear that the new testimony could not have been obtained with reasonable diligence on the former trial.

3. It must be material to the issue.

4. It must go to the merits of the case and not to impeach the testimony of a former witness.

5. It must not be cumulative. See, also, *Raphaelsky v. Lynch*, 12 Abb. N. S. 224.

Thus, the application for a new trial on the ground of newly-discovered evidence will be denied if the existence of the new evidence was known to the applicant before the trial, even though at the time of the trial it had been forgotten by him. *Fleming v. Hollenbeck*, 7 Barb. 271; *Meyer v. Fiegel*, 38 How. 424; *Dodge v. New York & Washington Steamship Co.*, 37 id. 524; S. C., 6 Abb. N. S. 451. So, if the applicant by the exercise of reasonable diligence might have procured the evidence, a new trial will not be granted on this ground (*Oakley v. Sears*, 7 Rob. 111; *People v. Marks*, 2 Park. 673; S. C., 10 How. 261; *Leavy v. Roberts*, 2 Hilt. 285; S. C., 8 Abb. 310; *Floyd v. Jayne*, 6 Johns. Ch. 479; *Best v. Starks*, 24 How. 58; *Fellows v. Emperor*, 13 Barb. 92); or, if the new evidence is merely cumulative (*Sheldon v. Stryker*, 27 How. 387; S. C., 42 Barb. 284; *Adams v. Bush*, 23 How. 262; S. C. affirmed, 2 Abb. N. S. 104; 25 How. 592 n; *Peck v. Hiler*, 30 Barb. 655; *Williams v. The People*, 45 id. 201; S. C. affirmed, 33 N. Y. [6 Tiff.] 688; *Lawrence v. Ely*, 38 N. Y. [11 Tiff.] 42; S. C., 5 Trans. App.

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128; *Nason v. Cockroft*, 3 Duer, 366; *Brisbane v. Adams*, 1 Sandf. 195; *Pike v. Evans*, 15 Johns. 210; *Steinbach v. Columbian Ins. Co.*, 2 Cai. 129; *Halsey v. Watson*, 1 id. 24; or, goes merely to impeach the testimony of a witness at the former trial. *Bunn v. Hoyt*, 3 Johns. 255; *Shumway v. Fowler*, 4 id. 425; *Meakim v. Anderson*, 11 Barb. 215; *Beach v. Tooker*, 10 How. 297; *Harrington v. Bigelow*, 2 Denio, 109. See *Jackson v. Kinney*, 14 Johns. 186; *Jackson v. Hooker*, 5 Cow. 207.

So, where the newly-discovered evidence would not, probably, change the result, a new trial will not be granted. *Powell v. Jones*, 42 Barb. 24. But the new evidence need not necessarily be conclusive. *Wheelwright v. Benedict*, 2 N. Y. Leg. Obs. 27.

Motions for a new trial upon the ground of newly-discovered evidence are not governed by any well-defined rules, but depend in a great degree upon the particular circumstances of each case. They are addressed to the sound discretion of the court, and from that discretion there is no appeal. *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. (6 Hand) 628.

As illustrations of the class of cases in which new trials will be granted on the ground of newly-discovered evidence, see *Nash v. Wetmore*, 33 Barb. 155; *Simmons v. Fay*, 1 E. D. Smith, 107; *Butterworth v. Warth*, 4 Bosw. 624.

s. Ejectment. The rules applicable to other cases, as to granting new trials, have never been rigidly enforced by the courts in actions of ejectment. *Jackson v. Laird*, 8 Johns. 489; *Jackson v. Dickenson*, 15 id. 309. And by the provisions of the Revised Statutes, a new trial is claimable as of right, in ejectment, by the unsuccessful party, at any time within three years after judgment against him, upon payment of costs and damages. 2 R. S. 309 (318), § 37. And the court, upon subsequent application made within two years after the rendition of judgment upon such second trial, if satisfied that justice will be thereby promoted, and the rights of the parties more satisfactorily ascertained and established, may vacate the judgment and grant a third trial. *Ib.*

Two trials only can, however, be granted under these provisions of the statute. *Ib.*; *Bellinger v. Martindale*, 8 How. 113. And if the action has been three times tried in an inferior court, a third new trial will not be allowed in the supreme court, on the action being transferred thereto. *Brown v. Crim*, 1 Denio, 665. Nor was it the intention of the statute that *each party* should be entitled to two new trials, although one party should succeed

Ejectment.

at one trial, and the other at the next. *Bellinger v. Martindale*, 8 How. 113.

A third trial will not be granted to a party who has lost his cause by overlooking a point of law or by conceding a fact, or omitting to seek a remedy by appeal from an erroneous decision, unless something to throw him off his guard is established. *Wright v. Milbank*, 9 Bosw. 672.

The time prescribed by the statute, within which a new trial is obtainable, runs from the date of the first judgment in the action, and not from the date of the affirmance of that judgment on appeal. *Chautauqua County Bank v. White*, 23 N. Y. (9 Smith) 347.

It is further provided by the Revised Statutes, that within five years after the docketing of a judgment in ejectment taken by default, the court may, on application of the defendant, his heirs or assigns, and upon payment of all costs and damages recovered thereby, vacate the judgment and grant a new trial, if such court shall be satisfied that justice will be promoted, and the rights of the parties more satisfactorily ascertained and established. 2 R. S. 309 (318), § 38.

The statutory right to a new trial in ejectment has not been interfered with by the provisions of the Code, and it still exists in actions for the recovery of real property under that instrument. *Cooke v. Passage*, 4 How. 360; S. C., 3 Code R. 88; *Rogers v. Wing*, 5 How. 50; *Evans v. Millard*, 16 N. Y. (2 Smith) 619; *Lang v. Ropke*, 1 Duer, 701; S. C., 10 N. Y. Leg. Obs. 70.

The provisions of the statute do not, however, apply to ejectment for the non-payment of rent. *Christie v. Bloomingdale*, 18 How. 12. Nor are they applicable to controversies submitted without action by the agreement of the parties to the general term (*Lang v. Ropke*, 1 Duer, 701; S. C., 10 N. Y. Leg. Obs. 70), or, to proceedings instituted for the purpose of determining conflicting claims to real property. *Malin v. Rose*, 12 Wend. 258.

In analogy with the statutory provisions above stated, the courts will be disposed to grant a new trial in an equitable action, which in effect determines the title to land, upon grounds which, in an ordinary case, would be deemed insufficient. *Clayton v. Yarrington*, 33 Barb. 144. See *Clark v. Brooks*, 2 Abb. N. S. 385; S. C., 2 Daly, 159.

But a proceeding instituted by an heir under the Laws of 1853, chapter 238, is not an action of ejectment so as to entitle the un-

Affidavit upon which to move for a new trial in an action to recover possession, etc.

successful party to a new trial as a matter of right, under the provisions of the Revised Statutes. *Marvin v. Marvin*, 11 Abb. N. S. 102.

Any number of new trials may, of course, be ordered in actions of ejectment, as in other actions, where application is made on any of the grounds heretofore noticed, as, for example, erroneous rulings on the trial, verdict against weight of evidence, admitting improper evidence, and the like.

Affidavit upon which to move for a new trial in an action to recover possession of real property.

(Title of cause.)

(Venue.)

J. N., being duly sworn, says:

I. That he is the (plaintiff) in this action.

II. That this action was brought to recover the possession of real property, to wit, a certain house and lot in the city of

III. That the action was tried at a circuit court, held in and for the county of , at , in said county, before Mr. Justice O. P. and a jury; and that on the day of , 18 , said jury returned a verdict in favor of the (defendant).

IV. That judgment was entered on said verdict herein within (three) years last past, on the day of , 18 , in favor of the (defendant).

V. That deponent is ready and willing to pay all costs and damages awarded against him as a condition of obtaining a new trial.

(Should the application be for a second new trial, the facts which show that justice will be thereby promoted should be set forth.)

t. Retrial by consent. Where a suit has been regularly and properly prosecuted to a final judgment, by which substantial justice has been decreed, the parties are not entitled, as a matter of right, to invoke the interposition of the court, for the purpose of having the cause retried at the expense of the public, although both litigants join in the application for a new trial. *Nichols v. Sixth Avenue Railroad Co.*, 10 Bosw. 260; S. C. affirmed, 38 N. Y. (11 Tiff.) 131.

u. Equity cases. The strict rule applicable to new trials in courts of law has never been recognized in courts of equity; and in actions of an equitable nature, in which issues have been framed for trial by jury, the court may grant or deny the motion for a new trial for reasons which would not be sufficient to induce

 Proceedings to obtain new trial.

or authorize a like decision in an action at law. *Clayton v. Yarrington*, 33 Barb. 144. The trial, in such cases, is simply for the information of the court with whom the ultimate decision of the case rests, and it is not, therefore, necessarily conclusive. The court may, if it thinks fit, make no use of the verdict, but treat it as a nullity. *Clark v. Brooks*, 2 Daly, 159; S. C., 2 Abb. N. S. 385; Greenl. Ev. 527. And, although the court would have been satisfied if the verdict had been the reverse of what it is, it will not, for that reason, send the case back for another trial. There must be something which shows that the verdict is clearly wrong—something which satisfies the court that it cannot be right. *Northam Bridge & Road Co. v. London & Southampton Railway Co.*, 11 Sim. 42.

The general rule to be obtained from the cases is, that whether the error complained of was the admission of improper testimony, or the rejection of that which was proper, or misdirection on the part of the judge, another trial will not be ordered, unless the court, taking the whole of the evidence together, and connecting it with the judge's charge, thinks that injustice has been done by the error committed, and it is dissatisfied with the verdict. *Clark v. Brooks*, 2 Abb. N. S. 385; S. C., 2 Daly, 159; *Forrest v. Forrest*, 25 N. Y. (11 Smith) 501, 512; *Lansing v. Russell*, 13 Barb. 510; S. C., 2 N. Y. (2 Comst.) 563; 4 How. 213; 2 Code R. 138; *Apthorp v. Comstock*, 2 Paige, 482; *Mulock v. Mulock*, 1 Edw. Ch. 14; *Patterson v. Ackerson*, 1 id. 96; *Head v. Head*, 1 Turn. & Russ. 138, 141; *Barker v. Ray*, 2 Russ. 63; *Bootle v. Blundell*, 19 Ves. 503; *Pemberton v. Pemberton*, 11 id. 52; *Warden of St. Paul's Church v. Morris*, 9 id. 165; *Slaney v. Wade*, 7 Sim. 595.

Section 3. Proceedings to obtain new trial.

a. In general. If, for any of the reasons already noticed, a party to an action believes that he has good and sufficient ground upon which to make application for a new trial, he at once begins to make the necessary arrangements for that purpose, and a thorough acquaintance with the proper mode of proceeding becomes all-important.

At common law it is necessary, for the purpose of obtaining a new trial, to prepare a *case* or a *bill of exceptions*. If the motion is founded upon a question of law, it is presented with exceptions; but, if founded upon facts, it is presented as a *case*; or, it may be made upon both, and then it is a *case with exceptions*. See 1 Burr. Pr. 261, 469.

In jury cases — Where the trial is by the court.

Under the Code, section 264, in cases tried by a jury, the motion for a new trial may be made upon the judge's minutes, before the same judge who tried the cause, and before the court adjourns, a proceeding wholly unknown to the common law. *Wilcox v. Hoch*, 62 Barb. 509.

So, under the Code, as amended in 1867, a motion for a new trial may be made on a case or exceptions, where a question of fact has been tried by the court, and the decision does not authorize a final judgment, but directs further proceedings before a referee or otherwise. Code, § 268.

b. In jury cases. The practice relative to motions for new trials under the Code, as prescribed by sections 264, 265, applies only to cases in which verdicts have been rendered in trials before juries, and has no reference to those cases in which the trial has been had before the court without a jury. See *Watson v. Scriven*, 7 How. 9; *Jackson v. Fassitt*, 21 id. 279; S. C., 33 Barb. 645; 12 Abb. 281. In an action which has been thus tried before a jury, a motion for a new trial may be made upon any ground which affords sufficient reason for granting a new trial, either on motion or on an appeal from the judgment. Thus, the motion may be made and a new trial granted for errors in law committed by a judge at the circuit, notwithstanding the existence of a remedy by appeal. *Potter v. Chadsey*, 16 Abb. 146. As a general rule, whatever would be a sufficient ground for setting aside a verdict will justify an order granting a motion for a new trial. *Spatz v. Lyons*, 55 Barb. 476.

The motion for a new trial, after a verdict by a jury, may be made upon a case, or upon exceptions, or upon the minutes of the judge before whom the cause was tried. Code, §§ 264, 265. The practice upon the motion in either case will be more definitely pointed out elsewhere.

c. Where the trial is by the court. Prior to the amendment of the Code in 1867, the only mode of obtaining a review on the merits of the decision of a judge, on a trial of fact by the court, was by an appeal from the judgment entered thereon to the general term. The mode of reviewing either errors in law or in fact, where the trial was by the court, was entirely distinct from that adopted where the trial was by a jury; and a review of a judge's decision, on a trial of an issue of fact, could not be had by a motion for a new trial. See *Burnett v. Phalon*, 4 Bosw. 622; *Cronk v. Canfield*, 31 Barb. 171; *Malloy v. Wood*, 3 Abb. 369;

Where the trial is by the court.

Matter of Livingston, 34 N. Y. (7 Tiff.) 555, 574. Hence, after a trial by the court, a motion for a new trial on the ground that the decision was against evidence, or the weight of evidence, or that the judge erred in any of his rulings, would not be entertained by the court. See *Watson v. Scriven*, 7 How. 9.

An order absolute for a new trial might be made by the general or special term, on its being made to appear that the judge's decision was unreasonably delayed, or an order might be made granting a new trial, unless the judge should file his decision within a specified time. Code, § 267. So a new trial might be granted on motion, upon the ground of irregularities, newly-discovered evidence, surprise or misconduct of the judge, in an action tried without a jury. So of an action tried by a referee. *Dorlon v. Lewis*, 9 How. 1; *Roosa v. Saugerties & Woodstock Turnpike Co.*, 12 id. 297. See *Leary v. Roberts*, 8 Abb. 310; S. C., 2 Hilt. 285; S. C. affirmed, 27 How. 599, note. But in no case was a new trial granted on the merits where the trial was by the court or by a referee. The party seeking a review of the decision of the court, or of a referee, was confined to his remedy by appeal from the judgment entered on the decision. In no case could the party review a mere interlocutory decision, made in the cause during the course of the trial, by the court, as the remedy by appeal was given only where a final judgment had been entered; and so far as the above rules apply to a review of the decision of a cause tried by a referee, they remain unchanged; but, by an amendment of section 268 of the Code, in 1867, it is provided that, where the decision of the court on a trial of an issue of fact, does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may move for a new trial at general term, and for that purpose may, within ten days after notice of the decision being filed, except thereto, and make a case or exceptions, as in case of an appeal.

The effect of this amendment is substantially to allow an appeal, before final judgment, directly to the general term, from an interlocutory decision or judgment directing an accounting or further proceedings before final judgment. *Bolles v. Duff*, 55 Barb. 580.

This amendment applies only to interlocutory decisions or judgments made subsequent to April 25, 1867. *Ib.* It will be observed, also, that the right to move for a new trial, where the

On minutes of the court.

trial is by the court, is given only where the decision of the judge is merely interlocutory and does not authorize final judgment; and that in all other cases the former rules applying to new trials, where the trial is by the court without a jury, remain unchanged.

As the mode of applying for a new trial, under the provisions of section 268, is substantially the same as under the provisions of section 265, a separate discussion of the respective applications will be unnecessary. The distinction to be observed in making the two applications relates to the time and place of moving, rather than to the mode of application.

d. On minutes of the court. By the provisions of section 264, "the judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages;" and if, for either of these reasons, he is satisfied there was error on the trial, it is his duty to grant the motion. *Spatz v. Lyons*, 55 Barb. 476. It has been held that this motion will not be entertained if based on any other grounds than those specifically enumerated; as, for example, that the verdict was contrary to the instructions of the court. *Tinson v. Welch*, 7 Rob. 392; or that the damages given by the jury were inadequate. *Moore v. Wood*, 19 How. 405.

A motion for a new trial, upon the judge's minutes, has, however, been granted on the latter ground. *McDonald v. Walter*, 40 N. Y. (1 Hand) 551. And so a new trial was granted where the motion was made upon the ground that the verdict was against *all* the evidence. *Allgro v. Duncan*, 24 How. 210; S. C. affirmed, 39 N. Y. (12 Tiff.) 313; 7 Trans. App. 106.

The motion can be made only at the same circuit or term at which the trial is had (Code, § 264), and before the judge who tried the cause, or, if before another judge, it should be made upon a case actually settled. *Nesmith v. The Clinton Fire Insurance Co.*, 8 Abb. 141; *Morange v. Morris*, 20 How. 257; S. C., 32 Barb. 650; 12 Abb. 164.

Application for a new trial in this way is not of frequent occurrence, and is more peculiarly appropriate in cases of manifest error or irregularity. If a lengthened statement or argument be required to make apparent the error or irregularity, a motion on a case in the regular form will be the proper course to be pursued. 2 Whit. Pr. 433.

On case or exceptions — How made — Case without exceptions.

e. On case or exceptions. Whenever it is intended to move for a new trial (except for irregularity, surprise, or upon the minutes of the judge), or to review, by appeal or otherwise, a trial by a jury, by the court, or by referees, a case or exceptions, or case containing exceptions, as may be proper and the moving party may elect, must be prepared, and a copy of the same served by such party. Sup. Ct., Rule 41.

When the verdict of the jury, or the decision of the judge or referee, is impeached for error generally, both as to the facts and the law, the usual procedure is that of a case containing exceptions. If the verdict of a jury is impeached for error on their part only, a case without exceptions will be sufficient; but, if the impeachment is for error of law, it will be necessary to prepare exceptions in the nature of the former bill of exceptions. See *Hunt v. Bloomer*, 12 How. 567; S. C., 13 N. Y. (3 Kern.) 341; *Smith v. Grant*, 15 N. Y. (1 Smith) 590; *Niles v. Price*, 23 How. 473.

f. How made. If a review is sought on a case and exceptions, the case should contain an accurate statement of all that took place upon the trial, which can in any way have a bearing upon the questions sought to be reviewed. This will include so much of the evidence given on the trial as has a direct or indirect reference to or bearing upon such questions, the exceptions taken throughout the trial, the charge of the judge, and the verdict of the jury.

If the charge of the judge should be omitted or but partially stated, the presumption will lie that it was correct, either wholly or as to the portions omitted. *Marine Bank of City of New York v. Clements*, 6 Bosw. 166; S. C. affirmed, 31 N. Y. (4 Tiff.) 33; 28 How. 581, *n*.

A case without exceptions is prepared, in all respects, as a case with exceptions, except that in the former, statements relative to exceptions taken on the trial are omitted.

Case without exceptions.

(*Title of cause.*)

1 The issues in this action came on for trial before the Hon.
2 A. B., one of the justices of this court, and a jury, at a
3 circuit court held at _____, in and for the county of _____, on
4 the _____ day of _____, 18____, when the following (or, the fol-
5 lowing among other) proceedings took place:

Case containing exceptions upon a trial by jury.

- 6 The plaintiff, by his counsel, opened the case; and then,
 7 to maintain the issues upon his part, he called as a witness
 8 C. D., who testified as follows. (*Here give direct examina-*
 9 *tion in full.*)
 10 On cross-examination, he testified: (*Give cross-examina-*
 11 *tion in full.*)
 12 The plaintiff then called as a witness E. F., who testified:
 13 (*Give the testimony, as indicated above.*)
 14 The plaintiff then read in evidence the deposition of G. H.,
 15 taken conditionally before Hon. J. K., justice, at the city of
 16 , on the day of , 18 , which was as follows: (*In-*
 17 *sert the deposition.*) The plaintiff then rested.
 18 The defendant, by his counsel, then opened his case to the
 19 jury.
 20 To maintain the issues upon his part, the defendant then
 21 called as a witness L. M., who testified: (*Give the testimony*
 22 *of defendant's witnesses as indicated above.*)
 23 The defendant then read in evidence the following writing,
 24 marked exhibit A: (*Insert the exhibit.*)
 25 The cause was then summed up by the respective counsel
 26 and submitted to the jury under the charge of the court.
 27 The jury found a verdict. (*State the verdict.*)

Case containing exceptions upon a trial by jury.

(*Title of cause.*)

- 1 The issues in said action came on for trial before the Hon.
 2 A. B., one of the justices of this court, at a circuit court (or,
 3 special term of this court), on the day of , 18 .
 4 A jury was called and sworn, and the plaintiff, by his
 5 counsel, opened the case.
 6 C. D. was then called as a witness on the part of the plain-
 7 tiff, and testified that (*here state the testimony of the witness.*)
 8 On being cross-examined, the witness testified that (*state*
 9 *what.*)
 10 The defendant's counsel here moved for a nonsuit, on the
 11 ground that (*state the grounds*), which motion was denied by
 12 the court, and defendant's counsel excepted.
 13 The defendant then called as a witness E. F., and offered to
 14 prove that (*state what*), to which plaintiff's counsel objected,
 15 which objection was sustained by the court, to which decision
 16 defendant's counsel excepted.
 17 The defendant then offered in evidence (*state what docu-*
 18 *mentary evidence was offered*), which evidence was excluded
 19 by the court, to which defendant's counsel excepted.
 20 The judge then charged the jury that (*state what*), to which
 21 the defendant's counsel excepted.
 22 The jury found a verdict for the plaintiff for .

Exceptions — Case containing exceptions, on a trial by the court or a referee, etc.

Exceptions.

(*Title of cause.*)

1 The issues in said action came on for trial before the Hon.
 2 A. B., one of the justices of this court, at a circuit court (*or*
 3 *special term of this court*), on the day of , 18 .
 4 A jury having been called and sworn, the plaintiff, by his
 5 counsel, opened the case.
 6 The plaintiff, then, to maintain the issues upon his part,
 7 offered in evidence, as an ancient deed, the following instru-
 8 ment (*insert the instrument*).
 9 The court held that the said instrument was not admissible
 10 as an ancient deed, and the plaintiff excepted.
 11 The plaintiff thereupon called, as a witness, C. D., who tes-
 12 tified that he was a brother of the subscribing witness to said
 13 deed ; and that said witness had left this State on a voyage to
 14 Europe twenty-five years ago, and that he had not since been
 15 heard from, nor had any account of the vessel in which he
 16 had sailed been received. On cross-examination he testified
 17 that he had not examined the shipping lists or "Marine
 18 Gazette" at the time of the supposed loss of the vessel. The
 19 defendant objected that the failure to call the subscribing wit-
 20 ness was not excused ; the court overruled the objection, and
 21 the defendant excepted. The witness then proved the gen-
 22 uineness of the grantor's signature and that of the subscribing
 23 witness ; and thereupon the court allowed the deed to be read
 24 in evidence, and defendant excepted.
 25 The plaintiff asked the same witness, "What, if you know,
 26 was the consideration of the said deed other than what is
 27 therein expressed ?" The defendant objected that this evi-
 28 dence was not admissible to vary the deed ; the court sus-
 29 tained the objection, and plaintiff excepted.
 30 The defendant offered to show that the said deed was made
 31 for the purpose of defrauding the grantor's creditors ; he did
 32 not claim that the defendant, or any one through whom he
 33 claimed, was a creditor of the said grantor.
 34 The offer was allowed, and the plaintiff excepted. The
 35 court directed the jury to find a verdict for the defendant, to
 36 which direction the plaintiff excepted.

Case containing exceptions, on a trial by the court or a referee.

(*Title of cause.*)

This action came on for trial before the court at a special term
 (*or circuit court*), held in and for the county of , at the
 court-house in (*or before C. D., the referee appointed by*
 this court to hear and determine the same, at his office at the city
 of), on the day of , 18 .

The plaintiff, by his counsel, having opened his case, read in
 evidence the note mentioned in the pleadings, which was marked

Finding of fact — Indorsement.

"Exhibit A," and is as follows: (*Insert the exhibit*), and then called as a witness E. F., who testified (*state what*).

The plaintiff then rested.

The defendant then called as a witness G. H., who testified, "I am the maker of the note 'Exhibit A.' On the day the same matured I handed to plaintiff a new note."

The defendant then called on plaintiff to produce this note, notice to produce it having been given. The plaintiff declined to produce it.

Q. State the contents of this new note?

[This question was objected to by the plaintiff as immaterial and irrelevant. The objection was overruled, and the plaintiff excepted.]

A. The new note was made by me to the order of the plaintiff, was dated on the day of the maturity of the previous note, and was payable ten days after date for dollars.

The witness further testified:

The plaintiff agreed to withdraw the previous note from the bank, and wait for the money until the second note came due.

Being cross-examined he testified: (*state what*).

The court (*or referee*) made and filed the following findings of fact and conclusions of law:

Finding of fact.

(*Here insert what facts were found.*)

Conclusions of law.

(*State briefly the conclusions of law.*)

Indorsement.

(*Title of cause.*)

Take notice, that the within is a copy of the case (*or exceptions, or case with exceptions*) proposed on behalf of the plaintiff (*or defendant*) herein.

(*Date.*)

(*Signature.*)

(*Address.*)

The form of statement in a case seeking the review of a trial by the court or by a referee, where the decision is sought to be impeached relative to a question of fact, should be substantially the same as on a trial by jury, averring generally what passed at the trial, giving the evidence relating to the proposed review, and noticing such exceptions as were taken on the trial. See *Hunt v. Bloomer*, 12 How. 567; S. C., 13 N. Y. (3 Kern.) 341; *Rogers v. Beard*, 20 How. 282.

Where the statement contained in a referee's report or a

Indorsement on papers.

judge's decision, of the facts found by him, differs from the specification inserted by him in the case on its settlement, the latter will be deemed to contain a true statement of the facts as actually found (*Hartman v. Proudfit*, 6 Bosw. 191), and the former statement will not be resorted to for the purpose of giving a construction to the latter, which could not be given to it according to the natural construction of such language. *Ib.*

Under the former practice, a bill of exceptions was a history of the trial sufficiently full to present the points of law excepted to, with the evidence on which the points raised arose, certified by the signature and seal of the judge. *Zabriskie v. Smith*, 11 N. Y. (1 Kern.) 480. And, under the Code, the same rule should be observed when the review is sought upon exceptions only. See *Smith v. Grant*, 15 N. Y. (1 Smith) 590. They need not, however, be signed nor sealed by any judge. Code, § 264. Nor is it necessary to make a formal bill of exceptions, as under the former practice. *Zabriskie v. Smith*, 11 N. Y. (1 Kern.) 480.

They must contain only so much of the evidence as may be necessary to present the questions of law upon which the same were taken on the trial; and it is the duty of the justice, upon settlement, to strike out all the evidence and other matters which shall have not been necessarily inserted. Rule 43, Sup. Ct.

They must, however, show the nature of the evidence claimed to be wrongfully excluded, with sufficient detail to enable the court to judge as to its materiality; and should also show clearly the conclusions of fact at which the court below arrived, and its ruling thereon. *Mead v. Northwestern Ins. Co.*, 7 N. Y. (3 Seld.) 530.

The facts out of which the questions of law arise should be plainly and concisely stated in a connected form, so as to present them to the court at a glance. *Price v. Powell*, 3 N. Y. (3 Comst.) 322. See, also, *Maher v. Carman*, 38 N. Y. (11 Tiff.) 25; S. C., 5 Trans. App. 25. And questions withdrawn, answers excluded without objection, and testimony not necessary to raise the questions on the exceptions should all be excluded. *Hoffman v. Aetna Fire Ins. Co.*, 1 Rob. 501, 524; S. C., 19 Abb. 325: 32 N. Y. (5 Tiff.) 405.

For the purposes of an *appeal* from a judgment entered on the decision of a judge, or a referee, the Code provides that either party may except to a decision on a matter of law arising upon such trial, within ten days after notice in writing of the judg-

Indorsement on papers.

ment, in the same manner and with the same effect as upon a trial by jury. Code, §§ 268, 272. As has been previously explained, the exceptions which are allowed to be thus taken are such as relate to the conclusions of law which are embodied in the decision of the judge or referee, and to which no earlier opportunity of excepting has been or could be afforded. These exceptions correspond to the exceptions which, on a jury trial, would be taken orally to the judge's charge; and have no relation to the exceptions to the rulings made on the trial on questions of evidence and the like, which must be taken when the rulings are made. See *Brewer v. Isish*, 12 How. 481; *Tremain v. Rider*, 13 id. 148; *Hunt v. Bloomer*, 12 id. 567; S. C., 13 N. Y. (3 Kern.) 341.

The exceptions which may be taken to the decision of a referee, after judgment, cannot in any case be used on a motion for a new trial, as a review of such decision on the merits can only be obtained by an appeal. Neither can they be used on a motion for a new trial, where the trial has been by the court without a jury, unless the decision of the judge is merely interlocutory, and directs further proceedings before a referee or otherwise, as the only mode of reviewing on the merits the final decision of a judge on the trial of an issue of fact is by an appeal. But when the decision of the judge does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may move for a new trial at general term, and for that purpose may, within ten days after notice that the decision has been filed, except thereto, and make a case or exceptions, as provided in case of an appeal from a final judgment. See Code, § 268.

The exceptions to the decision in such cases will be made and served in the same manner as an exception to a referee's decision after judgment entered, and will be similarly incorporated into a case with the exceptions, if any, taken during the trial, except that the exceptions must be taken within ten days of the notice of filing the *decision*, instead of the notice of the filing of the *judgment*.

Notice of exceptions.

(*Title of cause.*)

I. *Take notice*, that the plaintiff excepts to the first of the conclusions of law found herein by Mr. Justice

 Notice of exceptions — Amendments.

II. That he also excepts to the second of said conclusions of law.

III. That he also excepts to the third of said conclusions of law, in so far as it is thereby decided that

(Date.)

(Signature.)

(Address.)

g. Amendments. The party served with a case or exceptions may, within ten days thereafter, propose amendments thereto by serving a copy thereof on the moving party. Sup. Ct., Rule 41. If unable to do so within this time, he should obtain an extension either by stipulation or by application to the court. The proposed amendments should be written, on the margin of a copy of the case itself, or on a separate paper, with a designation of the page and line of the original case proposed to be altered, and each alteration proposed should be specially pointed out. *Milward v. Hallett*, 1 Cal. 344; *Stuart v. Binsse*, 3 Bosw. 657; S. C., 4 id. 616.

Although, as a general rule, it is not allowable for a party to prepare and serve a substituted case or exceptions by way of amendments, yet the court may permit it in a very extreme case. *Ib.* See *Eagle v. Alner*, 1 Johns. Cas. 332. Thus, if a case, as proposed, be so imperfect by reason of omissions and inaccuracies, that the necessary amendments require the making of a substitute, or the proposal of amendments to each line and passage thereof, with such multiplicity of detail that the labor of settling them would be far greater than the examination and approval of a substitute, the court will permit the proposal of such substituted case. *Stuart v. Binsse*, 3 Bosw. 657; S. C., 4 id. 616.

Amendments proposed to case, etc.

(Title of cause.)

Take notice, that the (plaintiff) proposes the following amendments to the case (or exceptions, or case containing exceptions) proposed on behalf of the (defendant):

First amendment:

On page 3, line 6, strike out the words (*State what.*)

Second amendment:

On page 4, line 24, insert at the end of the paragraph the following: (*State what.*)

Third amendment:

On page 5, strike out the 10th, 11th, 12th and 13th lines, and substitute the following: (*State what.*)

Fourth amendment:

- On 16th page, line 28, after the word "Albany" insert (*State what.*)

(Date.)

(Signature.)

(Address.)

h. Settlement of case. On receipt of the proposed amendments, the moving party may, within four days thereafter, serve the opposite party with a notice, that the case or exceptions, with the proposed amendments, will be submitted at a time and place, to be specified in the notice to the justice or referee before whom the cause was tried for settlement.

The justice or referee shall thereupon correct and settle the case according to the facts, and shall, at that time, find on such other questions of fact as may be required by either party, and be material to the issue. Sup. Ct., Rule 41. See *Van Slyke v. Hyatt*, 46 N. Y. (1 Sick.) 259; *Lefler v. Field*, 47 N. Y. (2 Sick.) 407; *People v. Church*, 2 Lans. 459; S. C., 57 Barb. 204. The time for settling the case must be specified in the notice, and it shall not be less than four nor more than twenty days after service of such notice. Sup. Ct., Rule 41.

The lines of the case must be so numbered that each copy shall correspond. *Ib.*

If the one party should omit to propose amendments, and the other to notify an appearance before the justice or referee, they will be respectively deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed. Sup. Ct., Rule 42.

Whenever amendments are proposed to a case or exceptions, the party proposing such case or exceptions shall, before submitting the same to the judge or justice for settlement, mark upon the several amendments his proposed allowance or disallowance thereof. Sup. Ct., Rule 43.

In settling the case, the judge will, of course, exercise his own discretion as to the version to be preferred, and may, if he chooses, substitute that appearing upon his own minutes. Thus, he has a right to correct his charge as presented by a case, even though the parties may have agreed upon it (*Root v. King*, 6 Cow. 569), and may even substitute a charge, prepared from his own minutes, for other versions of it suggested by the parties. *Toplitz v. Raymond*, 10 Abb. 60. He may also insert in a case

 Notice of settlement of case, etc. — Re-settlement.

such material facts as he deems necessary to render his charge intelligible. *Walsworth v. Wood*, 7 Wend. 483.

The settlement of a case is a judicial, and not a ministerial, act; and where, therefore, on appeal from the determination of three referees, the case was settled by two of the referees only, in the absence of the third, and without notice to him, the proceeding was held to be irregular, and the case sent back for a re-settlement. *Fielden v. Lahens*, 14 Abb. 48. See *Townsend v. Glen's Falls Ins. Co.*, 10 Abb. N. S. 277.

Where the judge, before whom the cause was tried, had died after the preparation, but before the settlement of a bill of exceptions taken to his decisions, the moving party was allowed by the court to make a fresh case containing those exceptions, the notice for settlement, as on an original case, to be before any justice of the court. *Morse v. Evans*, 6 How. 445.

The judge or referee may be compelled by *mandamus* to settle a case or exceptions, but before the writ will be issued for such a purpose, it must be made to appear that, when so settled, it will be according to the facts. *People v. Baker*, 14 Abb. 19; S. C., 35 Barb. 105; *Sikes v. Ransom*, 6 Johns. 279; *Delavan v. Boardman*, 5 Wend. 132; *People v. Washington C. P.*, 1 Caines, 511.

Notice of settlement of case, etc.

(*Title of cause.*)

Take notice, that the proposed case (or exceptions, or case containing exceptions) in this action, together with the proposed amendments, will be presented for settlement to the Hon. T. M., the judge (or referee) before whom this cause was tried, at chambers (or at his office at), on the day of , 18 , at o'clock.

(*Date.*)

(*Signature.*)

(*Address.*)

Re-settlement. Either party, if dissatisfied with the judge's settlement of the case or exceptions, may move the court for a re-settlement on affidavits showing what took place, and the errors committed on the settlement; and a motion for this purpose may be made notwithstanding the pendency of an appeal to the higher tribunal; and it will not be necessary first to remit the record for that purpose. *Witbeck v. Waine*, 8 How. 433. A motion for re-settlement is the proper mode of proceeding in the first instance (*Delavan v. Boardman*, 5 Wend. 132); but when

Filing of case, when settled — Motion to be made.

necessary, a *mandamus* will lie to compel the correct settlement of a case. *People v. Baker*, 35 Barb. 105 ; S. C., 14 Abb. 19.

i. Filing of case, when settled. By the forty-fourth rule of the supreme court, it is provided that "when a party makes a case or exceptions, he shall procure the same to be filed within ten days after the same shall be settled, or it shall be deemed abandoned unless the time is extended by a justice.

And, on filing affidavit that such case or exceptions has not been filed, and showing the time of settlement thereof, and that more than ten days had elapsed from the time of such settlement, or from the expiration of the time to which it was extended, an order, of course, may be entered declaring the same abandoned, and the party may proceed as if no case or exceptions had been made."

Under this rule, the moving party is required to file with the clerk of the court the original paper, that is, the case and amendments as they came from the judge or referee, with the corrections or allowances as made by him, and not a mere copy of the case. *Parker v. Link*, 26 How. 375.

Until the time for filing, or its extension, expires, the case cannot be noticed for argument. Extending the time to file is equivalent to extending the time to print the case when made (*Donohue v. Hicks*, 21 How. 438); and it seems doubtful whether the appellate court can affirm a judgment, where a case has been made, before it has been either filed or served. *Warren v. Eddy*, 13 Abb. 28 ; S. C., 32 Barb. 664.

j. Motion to be made. A motion for a new trial upon the judge's minutes can be made only at the same term or circuit at which the cause is tried. Code, § 264.

So, where the trial was by jury, the motion, if made on a case or exceptions, must, in the first instance, be heard and decided at the circuit or special term, unless the motion, being made on exceptions alone, is directed by the judge trying the cause to be heard in "the first instance at the general term. Code, § 265. If there are questions of fact to be examined, the judge at the circuit cannot direct a case to be reserved, and heard at the general term in the first instance. *Cronk v. Canfield*, 31 Barb. 171 ; *McBride v. The Farmers' Bank*, 26 N. Y. (12 Smith) 450 ; *Hoxie v. Greene*, 37 How. 97 ; *Dickerson v. Wason*, 48 Barb. 412 ; *Hotchkins v. Hodge*, 38 id. 117 ; *Mason v. Breslin*, 9 Abb. N. S. 427.

Order to hear exceptions at general term.

If the issue was tried by the court without a jury, and the decision does not authorize a final judgment, but directs further proceedings before a referee or otherwise, the motion for a new trial on a case or exceptions must, in the first instance, be made at general term. Code, § 268.

An exception to the granting of a motion for a nonsuit or dismissal of the complaint stands upon the same footing as an exception taken by the plaintiff to the judge's rulings in the admission or rejection of evidence, and may be directed to be heard at general term in the first instance. *Mason v. Breslin*, 40 How. 436; S. C., 9 Abb. N. S. 427; 2 Sweeny, 391; *Lake v. Artisans' Bank*, 3 Abb. N. S. 209; S. C., 1 Trans. App. 71; 3 Keyes, 276; reversing S. C., 17 Abb. 232; *Huntingdon v. Clafin*, 38 N. Y. (11 Tiff.) 182; S. C., 6 Trans. App. 168; 10 Bosw. 262.

Where there are exceptions, and the new trial is sought on questions of law only, unless there is an order that the exceptions be heard in the first instance at general term, the motion must be heard at special term. *Potter v. Chadsey*, 16 Abb. 146; *Watson v. Scriven*, 7 How. 9; *Taylor v. Harlow*, 11 id. 285; *Morange v. Morris*, 12 Abb. 164. And even where exceptions are ordered to be heard in the first instance at general term, but, instead of moving at general term, a motion for a new trial on the exceptions is made and decided at a special term, from which decision an appeal is taken to the general term, the latter court will treat the directions to have the exceptions heard at general term in the first instance, as waived by the parties, and the decision made at special term as the decision of the judge who tried the cause, whether it was so in fact or not. *Ely v. McNight*, 30 How. 97.

Order to hear exceptions at general term.

(*Title of cause.*)

I hereby direct that the exceptions taken at the trial of this cause, on the part of the _____, when the same shall be duly settled and filed, be heard in the first instance at the general term, and not at a special term of this court. And I do hereby further direct that the entry of judgment in this cause be suspended in the mean time, and until after the hearing of such exceptions and the decision of the general term thereon.

(*Date.*)

(*Signature of judge.*)

Motions for new trials, not founded on a case or exceptions, as, for example, on the ground of newly-discovered evidence,

Motions for, when to be made.

surprise, or the like, must in the first instance be made at special term. If denied, an appeal from the order there made may be taken to the general term, and be heard at the same time as the appeal from the judgment. *Taylor v. Harlow*, 11 How. 285; *Clarke v. Ward*, 4 Duer, 206; *Morrison v. The New York & New Haven R. R. Co.*, 32 Barb. 568.

A verdict, subject to the opinion of the court, comes up for judgment at the general term in the first instance. Code, § 265.

k. When to be made. In conformity with the former practice, it was at one time regarded as a settled rule, under the Code, that a motion for a new trial must be made before the entry of final judgment (*Merchants' Bank v. Scott*, 59 Barb. 641; *Jackson v. Fassitt*, 12 Abb. 281; S. C., 33 Barb. 645; 21 How. 279; reversing S. C., 9 Abb. 137; *Gurney v. Smithson*, 7 Bosw. 396; *Anderson v. Dickie*, 17 Abb. 83; S. C., 26 How. 105; 1 Rob. 238, 700; *Barnes v. Roberts*, 5 Bosw. 73); unless judgment was allowed to be entered by way of *security* merely, in which case it was no obstacle to a motion for a new trial upon the evidence, because the judgment, being only conditional and for a special purpose, the application for a new trial was still treated as an application *before* judgment. *Ib.*; *Benedict v. Caffé*, 3 Duer, 669; *Morange v. Morris*, 32 Barb. 650; S. C., 12 Abb. 164; 20 How. 257. And so the court would sometimes permit the motion to be made, after the absolute entry of judgment, where sufficient excuse was shown for not making the motion before judgment (*Stilwell v. Staples*, 4 Rob. 639. See *Magnus v. Trischet*, 2 Abb. N. S. 175); or, if necessary, convert an absolute judgment into one to stand merely as security. *Stilwell v. Staples, supra*.

The practice has at length been settled by the court of appeals, and the rule now is that a motion for a new trial upon the ground that the verdict is against the weight of evidence, or of surprise, of newly-discovered evidence, of misconduct of the jury, or other ground, can be made at special term, notwithstanding the previous entry of a judgment on the verdict. *Tracey v. Altmyer*, 46 N. Y. (1 Sick.) 598. See, also, *Blydenburg v. Johnson*, 9 Abb. N. S. 459; *Folger v. Fitzhugh*, 41 N. Y. (2 Hand) 228; *Tucker v. White*, 27 How. 97; S. C., 28 id. 78.

The motion for a new trial must be made promptly, and especially is this the case when the motion is based upon the ground of surprise, or newly-discovered evidence; and a new trial will not be granted on these grounds where a party has been guilty

How to be made — Stay of proceedings.

of *laches* in making his motion. *Snowhill v. Knapp*, 7 N. Y. Leg. Obs. 15; *Rapelye v. Prince*, 4 Hill, 119; *Peck v. Hiler*, 30 Barb. 655; *Sheldon v. Stryker*, 42 id. 284; S. C., 27 How. 387.

l. How to be made. When brought on, the application for a new trial will be an enumerated motion (see Rule 47, Sup. Ct.; *Ellsworth v. Gooding*, 8 How. 1; *Van Schaick v. Winne*, 8 id. 5), and, as such, it must be noticed and placed upon the calendar in the usual manner.

m. Stay of proceedings. Application should, in all cases, be made for a stay of proceedings, until the case can be settled and the motion heard; and, as a general rule, this will be granted, unless the proceeding be palpably frivolous or dilatory.

A case or bill of exceptions is not, of itself, a stay of proceedings, and an application for the latter must be made in due form, or the adverse party may go on, and enter judgment on his verdict. *Oakley v. Aspinwall*, 1 Sandf. 694. The usual practice is to make the application at the trial to the judge who tried the cause; and this course is preferable, inasmuch as the order when so made is not affected by the limitation of twenty days, imposed by section 401, subdivision 6, of the Code.

On the other hand, the judge who tried the cause may grant the stay for any period he may deem reasonable. *Mitchell v. Hall*, 7 How. 490; *Steam Navigation Co. v. Weed*, 8 id. 49; *Harris v. Clark*, 10 id. 415.

Where a general stay of proceedings cannot be obtained from the judge who tried the cause, and more than twenty days is required, application may be made to any other judge, upon notice, when any period of time may be asked for that may be necessary.

A stay, when obtained, suspends all regular proceedings, until it has expired or is vacated, including the giving of notice of the entry of judgment, with a view to limit the time for appealing. *Bagley v. Smith*, 2 Sandf. 651. It will not, however, prevent an application being made for a provisional remedy, unconnected with the ordinary progress of the cause. *Thompson v. Erie Railway Co.*, 9 Abb. N. S. 233; *Lapeous v. Hart*, 9 How. 541.

Order for time to prepare a case or exceptions, with stay.

(Title of cause.)

(At a special term, etc.)

(On reading and filing the affidavit of A. B., and) on motion of C. D., plaintiff's attorney:

Affidavit to move for new trial on ground of the misconduct of the jury.

ORDERED : That the defendant have _____ days from the date of this order to make and serve a case or exceptions, and serve a notice of motion for a new trial herein ; and that, in the mean time, and until the settlement of such case or exceptions, if served, and until the hearing and determination of such motion, if made, the entry of judgment herein be stayed.

n. Affidavits. A motion for a new trial on affidavits alone will be entertained only when such motion is based on the ground of irregularity or surprise (Sup. Ct., Rule 41), and the irregularity must be of such a nature as cannot be objected to at the trial ; all questions that can be raised there being available only on a case or exceptions.

The affidavits of jurors cannot be received as evidence to show a mistake in making up their verdict. *Ex parte Caykendoll*, 6 Cow. 53 ; *Brownell v. McEwen*, 5 Denio, 367 ; *Jackson v. Williamson*, 2 T. R. 281, or that their verdict was given under a misapprehension as to its effect (*People v. Columbia C. P.*, 1 Wend. 297) ; nor for the purpose of showing their own misconduct, or that of their fellows, during the trial or consultation. *Clum v. Smith*, 5 Hill, 560 ; *Green v. Bliss*, 12 How. 428 ; *Thomas v. Chapman*, 45 Barb. 98 ; *Dana v. Tucker*, 4 Johns. 487 ; *Vaise v. Delaval*, 1 T. R. 11 ; *Owen v. Warburton*, 4 Bos. & Pul. 326.

Affidavit to move for new trial on ground of the misconduct of the jury.

(Title of cause.)

(Venue.)

A. B., being duly sworn, says :

The jury impaneled in the above entitled cause, in finding their verdict in the same, resorted to the determination of clause, to wit (*state in what manner*).

(*Jurat.*)

(*Signature.*)

Affidavit to move for new trial on ground of newly-discovered evidence.

(Title of cause.)

(Venue.)

C. D., being duly sworn, says :

I. That he is the (*defendant*) in this action.

II. That this action was tried on the _____ day of _____, 18____, at a (*circuit court*), held in and for the county of _____, at _____, in said county.

III. That said trial resulted in a verdict for the (*plaintiff*) for _____ dollars.

Affidavit to move for new trial on ground of surprise.

IV. That since the said trial, and on the day of , 18 , deponent has discovered for the first time that he could have proved by one E. F., who resides at , the following facts (*state what*).

(*Jurat.*)

(*Signature.*)

(*Here follows, as corroborating evidence, the affidavit of the witness relied on to prove the facts alleged on the new trial.*)

Affidavit to move for new trial on ground of surprise.

(*Title.*)

(*Venue.*)

G. H., being duly sworn, says:

I. That he is the (*defendant*) in this action.

II. That, previous to the trial of said cause, to wit, on the day of , 18 , at , one J. K. informed the deponent that he, the said J. K., knew and would testify to (*state what*), and, relying on said assurance, deponent took no steps to procure the testimony to said fact, and summoned the said J. K. to testify to the same; but the said J. K., when called to the stand at the trial of said cause, by collusion with the (*plaintiff*) therein (*or state any fact or occurrence for which* (*defendant*) is *not responsible*) testified contrary to what he had previously stated he should do, and the verdict, which was against the defendant, was mainly attributable to said testimony, and on a new trial (*state material point*) will be established by evidence, and a different verdict will result.

III. Deponent is further able to prove the same fact by L. M., who resides at , and whose testimony he can procure at the new trial of this cause.

(*Jurat.*)

(*Signature.*)

(*Affidavit of witness relied on.*)

Such affidavits are, however, admissible as evidence to show the misconduct of a party, or of the officer having charge of them (*Thomas v. Chapman*, 45 Barb. 98; *Reynolds v. Champlain Trans. Co.*, 9 How. 7; *Wright v. The Ill. & Miss. Tel. Co.*, 20 Iowa, 195); or, that they were led into error in making up the verdict, by the misdirection of the judge in his charge (*Sargent v. Denniston*, 5 Cow. 106); or to show that the foreman, by mistake, delivered a wrong verdict (*Cogan v. Ebdon*, 1 Burr. 383); or that the clerk entered the verdict differently from what they intended. *Jackson v. Dickenson*, 15 Johns. 309. And, generally, such affidavits may be received to show any matter occurring during the trial or in the jury room, which *does not*

 Notice of motion for a new trial — Practice on hearing.

essentially inhere in the verdict itself. *Wright v. The Ill. & Miss. Tel. Co.*, 20 Iowa, 195.

It is always competent for a party to offer the affidavits of the jurors for the purpose of sustaining their verdict (*Dana v. Tucker*, 4 Johns. 487; *Nesmith v. Clinton Fire Ins. Co.*, 8 Abb. 141); but this species of evidence has been generally regarded as very unreliable. *Eastwood v. The People*, 3 Park. 25.

Affidavits of counsel and others, on information and belief, as to the misconduct of the jury, are not admissible as evidence to impeach the verdict. *People v. Hartung*, 17 How. 85; S. C., 8 Abb. 132; 4 Park. 314; *People v. Wilson*, 8 Abb. 137; S. C. reversed, 4 Park. 619.

o. Notice of motion. The motion for a new trial must be brought before the court on the usual notice of eight days, as prescribed by section 402 of the Code. See Sup. Ct., Rule 46.

Notice of motion for a new trial.

(*Title of cause.*)

Take notice, that on the case (or exceptions, or case containing exceptions), (or upon the affidavits, of which copies are herewith served upon you), and upon all the pleadings and proceedings herein, I shall move this court, at a special term thereof, to be held in and for the county of _____, at the city hall, in the city of _____, on the _____ day of _____, 18____, at _____ o'clock, for a new trial herein.

(*Date.*)

(*Signature.*)

(*Address.*)

p. Opposing the motion. A motion of this kind is opposed in the usual manner and upon such facts as are sufficient to answer the moving papers.

q. Practice on hearing. A motion for a new trial on the judge's minutes being usually made immediately after the close of the trial, no special papers need be prepared for the purpose, and a mere notice to the opposite party will be all that is necessary. In case an arrangement cannot be effected with the opposite counsel, to bring on the motion by consent, the better course will be to procure an order to show cause, from the judge himself, which may be in the following form :

(*Title of cause.*)

Let the plaintiff (or defendant) show cause before me, at the circuit court now in session in and for the (city and) county of _____ at the court-house in _____ (or at the city hall in said

Notice of motion for a new trial on the judge's minutes.

city), on the day of , 18 , why an application for a new trial herein, on the judge's minutes, should not be entertained; and if said application is so entertained, then why such new trial should not be granted; and in the mean time, and until determination of said motion, not exceeding twenty days, let all proceedings on the part of said be stayed.

(Date.)

J. P.,
Justice, etc.

Notice of motion for a new trial on the judge's minutes.

(Title of cause.)

SIR: *Take notice*, that a motion will be made before the circuit court now in session in and for the (city and) county of , at the court-house in (or at the city hall in said city), on the day of , 18 , for an order granting a new trial in the above entitled action, which motion will be made on the pleading in the action, and on the judge's (or stenographer's) minutes of the trial in said action.

(Date.)

Yours, etc.,

(Address.)

(Signature.)

The motion, when made on a case or exceptions at special term, should be noticed and placed on the calendar, in the same manner as a cause for trial. The case on file may be procured from the office of the clerk of the court, for the use of the judge, and he should also be furnished with a copy of the pleadings.

The application, when brought on for hearing at general term, will be an enumerated motion (see Sup. Ct., Rule 47), and, as such, must be noticed and placed upon the calendar in the usual manner. The papers and points should be printed, as on an appeal. See Sup. Ct., Rule 52.

The decision at special term must be entered as an order, and service of the same made on the opposite party in the usual manner. At general term, the decision, when made, will embrace the entry of judgment, and present the same features as one on appeal.

On the hearing of the motion, the counsel for the party moving opens the argument, the opposite counsel answers, and the counsel for the party moving has the reply. One counsel only will be heard on each side. Sup. Ct., Rule 58. See Old Practice, 1 Burr. Pr. 331.

r. Granting or refusing new trial. The effect of granting the motion for a new trial is to remit the cause back to the stage of the original joinder of issue, and it must then be brought on a

Granting or refusing new trial — Order granting motion for a new trial.

second time for trial, in due course, and in regular form. On the second trial, the date of the issue will be that of the original joinder, and the cause will accordingly take a higher place on the calendar, and come on at an earlier period. If the party in whose favor the motion is granted neglects to proceed, the opposite party may do so, and set down the cause in due order, in the usual manner. *Gale v. Hoysradt*, 3 How. 47.

Where, however, a new trial is granted on application of the defendant, a copy of the order granting the same must be served on the plaintiff's attorney, before the defendant can move for a dismissal of the complaint for not proceeding to trial. But the rule is otherwise where the new trial is granted on application of the plaintiff. *Robb v. Jewell*, 6 How. 276.

Where a new trial has been granted in a case involving the examination of a long account, it is no objection to a motion for a reference, that the cause had once been tried by a jury. *Brown v. Bradshaw*, 1 Duer, 635; S. C., 8 How. 176. And upon awarding a new trial as a matter of right, the court has no power to direct that the evidence given on the previous trial, either wholly or in part, shall stand as evidence on the second trial. *Bissell v. Hamlin*, 13 Abb. 22; *Bruce v. Davenport*, 5 Abb. N. S. 185; S. C., 3 Trans. App. 82; 3 Keyes, 472. The only mode by which evidence given on the former trial may be made available in the second, is by consent or stipulation between the parties.

As a general rule, costs of the application and of the former trial will be imposed upon the applicant on granting a new trial on a question of law, by way of favor, and not as a strict right. *Hicks v. Waltermire*, 7 How. 370; *Kelley v. Upton*, 12 id. 140; *Kennedy v. The Harlem R. R. Co.*, 3 Duer, 659; *Benedict v. Johnson*, 2 Lans. 94; *Corning v. Corning*, 6 N. Y. (2 Seld.) 97; affirming S. C., 1 Code R. (N. S.) 351.

So, where a new trial is granted for the error of the jury in finding a verdict against the evidence, the party making application must pay costs. *Overing v. Russell*, 28 How. 151; *North v. Sargent*, 20 id. 519; 33 Barb. 350; *Same v. Same*, 14 Abb. 223; *East River Bank v. Hoyt*, 22 How. 478; *Hamill v. Willett*, 6 Bosw. 533.

Order granting motion for a new trial.

(Title of cause.)

(At a special term, etc.)

A motion for a new trial on the part of the (plaintiff) herein, having been made on the case (or exceptions, or case contain-

Order granting motion for a new trial — Proceedings after verdict, etc.

ing exceptions), (and upon reading and filing the affidavits of), and after hearing A. B., Esq., of counsel for the plaintiff, in support of said motion, and C. D., Esq., of counsel for the defendant, in opposition * :

ORDERED : That the said motion for a new trial be, and the same hereby is granted (*or, granted, with costs to abide the event, or on payment of costs, or on payment of all costs of the action after notice of trial, or on condition that the plaintiff stipulate, etc., or otherwise state the terms on which the new trial is granted*).

Order granting motion, unless the opposite party will consent to reduce his verdict.

(*Same as above, to the * :*)

ORDERED : That the said motion for a new trial be, and the same hereby is granted, unless the plaintiff, within days, stipulate to reduce the verdict to dollars (*or unless the defendant, within days, stipulate to waive the sum awarded to him by the verdict for his counter-claim therein*), in which case said motion is denied (without costs).

Order denying motion for a new trial.

(*Same as in last form but one, to the * :*)

ORDERED : That the said motion be, and the same hereby is denied (with costs).

s. Vacating order. If the ground of an order denying a new trial has been removed, as where it was based upon an adjudication which has since been reversed, the order should be vacated and a new trial ordered. *Gilchrist v. Comfort*, 26 How. 394 ; S. C. affirmed, 34 N. Y. (7 Tiff.) 235.

t. Proceedings after verdict on feigned issue. The object of a feigned issue is to satisfy the conscience of the court ; and if the trial has been fairly conducted, and the conclusion of the jury is the same as the court itself would have come to, upon the evidence in the cause, a new trial should not be ordered. In reviewing the trial of such an issue, the court is governed by the rules which prevail on motions for a new trial on a case. See *Lansing v. Russell*, 13 Barb. 510 ; *Clark v. Brooks*, 2 Abb. N. S. 385 ; S. C., 2 Daly, 159 ; *Clayton v. Yarrington*, 33 Barb. 144 ; *Snell v. Loucks*, 12 id. 385 ; *Morris v. Morange*, 38 N. Y. (11 Tiff.) 172 ; S. C., 4 Abb. N. S. 447, 451 ; 6 Trans. App. 1.

Section 4. Proceedings, if new trial granted.

a. In general. The proceedings, in case the motion for a new trial be granted, have been already partially noticed, *ante*, section

3. It has been observed that the only difference between the second trial and the first will be the clearer views which the parties will have as to what will or will not be considered as admissible, either in point of evidence or of argument. If the decision on the motion was made in writing, it may be made use of for this purpose, and the judge may probably require a copy for his information, which should be in readiness accordingly. 2 Whit. Pr. 451.

A proper notice of trial must be served, and the usual jury process issued, and the cause must be entered for trial as in ordinary cases. *Ante*, 25. The jurors impaneled on the new trial must be fresh persons and not one of the former jurors, and it is, therefore, a ground of challenge on the second trial that one of the jurors was on the former trial. *Argent v. Darrell*, 2 Salk. 648. See *Rex v. Mawbrey*, 6 T. R. 619; 4 Chit. Gen. Pr. 93.

b. Second, or other new trial. If, on the new trial, the jury find for the party against whom the former verdict was given, it is discretionary with the court to grant a third trial (*Parker v. Ansell*, 2 Wm. Bla. 963); and so a third trial may be granted after two *concurring* verdicts. *Goodwin v. Gibbons*, 4 Burr. 2108; *Tindal v. Brown*, 1 T. R. 167. In either case, however, this discretion is seldom exercised by the court in granting a third trial. *Fowler v. Aetna Fire Ins. Co.*, 7 Wend. 270; *Haring v. New York & Erie R. R. Co.*, 13 Barb. 9. If the action of the jury on a second trial is indicative of bias and partiality, it will be regarded by the court as a proper case for interference, and, accordingly, a third trial will ordinarily be granted. *Gilligan v. The New York & Harlem R. R. Co.*, 1 E. D. Smith, 453. But the courts will impose some limitation on the right of applying for a new trial, even where the circumstances are exceedingly doubtful. Thus, where three successive verdicts had been rendered, on feigned issues, against a defendant in a suit for divorce on the ground of adultery, a fourth trial was denied by the court of appeals, although the evidence was purely circumstantial, and not entirely conclusive. *Ferguson v. Ferguson*, 7 How. 217.

c. Appeal from order. The decision of the judge upon the facts, in granting or refusing a new trial, is reviewable by appeal to the general term, and the only proper mode of making that review is by appeal from the *order* granting or refusing such new trial. The appeal from a judgment only authorizes a review of

When new trial refused.

the questions of fact, when the trial is by the court without a jury, or by referees. See *Marquart v. La Farge*, 5 Duer, 559; *Ogden v. Coddington*, 2 E. D. Smith, 317; *Brown v. Richardson*, 1 Bosw. 402; *Benedict v. Caffé*, 3 Duer, 669; *Fry v. Bennett*, 16 How. 385. In practice, the appeal from the order is, however, usually heard at the same time with the appeal from the judgment to the general term. See *Morange v. Norris*, 20 How. 257. An appeal from an order denying a motion for a new trial, made on the judge's minutes, may be taken to the general term before or after judgment has been entered in the action. *Lane v. Bailey*, 30 How. 76; S. C., 45 Barb. 119; 1 Abb. N. S. 407. See *Magnus v. Trischet*, 2 Abb. N. S. 175.

The court of appeals is confined to the correction of errors of law only, and has no power to review any questions of fact determined in the subordinate courts. And when a new trial has been granted in the court below after a trial by jury, the court of appeals must either affirm the order, if it can stand consistently with any view to be taken of the evidence given at the trial, or dismiss the appeal. *Macy v. Wheeler*, 18 Abb. 73; S. C., 30 N. Y. (3 Tiff.) 231; *Dickson v. Broadway & Seventh Avenue R. R. Co.*, 47 N. Y. (2 Sick.) 507; *Wright v. Hunter*, 46 N. Y. (1 Sick.) 409; *Sands v. Crooke*, id. 564; *Rogers v. Long Island R. R. Co.*, 49 N. Y. (4 Sick.) 655; *Downing v. Kelly*, 48 N. Y. (3 Sick.) 433. See *Miller v. Schuyler*, 20 N. Y. (6 Smith) 522.

Section 5. When new trial refused.

a. In general. A motion for a new trial, founded on the improper admission of immaterial or irrelevant testimony, will not be granted, where the introduction of such testimony could, in no possible way, have worked any prejudice to the party objecting. *Spatz v. Lyons*, 55 Barb. 476; *Lamb v. Camden & Amboy R. R. and Trans. Co.*, 2 Daly, 454; *Klock v. Buell*, 56 Barb. 398; *Mayor, etc., of New York v. Second Avenue R. R. Co.*, 32 N. Y. (5 Tiff.) 261. So the motion will be denied and a new trial refused where the reason given for the decision is wrong, but the decision itself is right. *Holtsinger v. National Corn Exchange Bank*, 37 How. 203; S. C., 6 Abb. N. S. 292; *Munro v. Potter*, 22 How. 49; S. C., 34 Barb. 358; *Hanford v. Artcher*, 4 Hill, 271; *Deland v. Richardson*, 4 Denio, 95. And a new trial will not be granted merely for the purpose of allowing a technical correction (*Cady v. Fairchild*, 18 Johns. 129; *Stephens v. Wider*, 32 N. Y. [5 Tiff.] 351; *Van Vechten v. Griffiths*, 1 Keyes, 104;

Objections not taken.

Devendorf v. Wert, 42 Barb. 227); or, for excessive damages where the parties will consent to deduct the excess (*Murray v. Hudson River R. R. Co.*, 47 Barb. 196; *Clapp v. Hudson River R. R. Co.*, 19 id. 461; *Sears v. Conover*, 33 How. 324; S. C., 3 Keyes, 113; affirming S. C., 34 Barb. 330. See *Cassin v. Delany*, 38 N. Y. [11 Tiff.] 178; S. C., 6 Abb. N. S. 1; 6 Trans. App. 199; reversing S. C., 1 Daly, 224); nor for the purpose of impeaching the character and credit of a witness. *Beach v. Tooker*, 10 How. 297; *Meakim v. Anderson*, 11 Barb. 215; *Powell v. Jones*, 42 id. 24.

And a new trial will not be granted for the admission of improper testimony where the other evidence is such that, if the jury had found for the party objecting, their verdict would have been set aside. *Jaeger v. Kelly*, 7 Rob. 586.

b. Objections not taken. The objections raised at the trial of a cause are alone available on a motion for a new trial, where the trial was by jury. *Staring v. Bowen*, 6 Barb. 109; *Smith v. Floyd*, 18 id. 522; *Waterville Manufacturing Co. v. Brown*, 9 How. 27. And it is well settled that an objection not taken in the court below cannot be raised for the first time on appeal, provided the objection, if taken below, could have been obviated. *Ib.*

Thus, where, on the trial, the defendant makes no request to submit a certain question of fact to the jury, upon which there is some evidence; or neglects to take objection to the insufficient proof of demand of personal property before suit brought, he cannot avail himself of such omissions on appeal to the general term. *Shafer v. Guest*, 6 Rob. 264; S. C., 35 How. 184. And where, in an action brought by persons suing as commissioners of highways to recover the costs of a re-assessment, there is some evidence given of their being such commissioners, and no question as to their being such was raised before the justice, either while the trial was progressing, or on a motion that was made for a nonsuit, and no such ground of appeal to the county court was specified; and the whole case shows that the plaintiffs were treated through the whole trial as commissioners of highways, it is too late, on appeal, to disturb the judgment of the county court on the ground that they were not such commissioners. *Cary v. Marston*, 56 Barb. 27. So, where incompetent evidence offered by the plaintiff is received without objection, it seems that the court will not, on the mere ground of its incompetency,

 Objections not taken — Harmless errors.

set aside a verdict for the plaintiff, even though such verdict was found entirely on that evidence. *Monk v. Union Mutual Life Ins. Co.*, 6 Rob. 455. See *Rosebrooks v. Dinsmore*, 5 Abb. N. S. 59; S. C., 36 How. 138; 1 Trans. App. 265; *Shaw v. Smith*, 5 Abb. N. S. 129; 1 Trans. App. 283; *Walker v. Gilbert*, 2 Daly, 80; *Meyer v. Fiegel*, 7 Rob. 122; S. C., 34 How. 434; *Hazard v. Spears*, 4 Keyes, 469; *Champney v. Blanchard*, 39 N. Y. (12 Tiff.) 111; S. C., 6 Trans. App. 53; *Wolfe v. Security Fire Ins. Co.*, id. 286; S. C., 39 N. Y. (12 Tiff.) 49; *Draper v. Stouvenel*, 38 N. Y. (11 Tiff.) 219; *Fountain v. Pettee*, id. 184; S. C., 6 Trans. App. 241. See *Keyes v. Devlin*, 3 E. D. Smith, 518; *Chester v. Dickerson*, 52 Barb. 349; *Coyle v. City of Brooklyn*, 53 id. 41; S. C. affirmed, 41 N. Y. (2 Hand) 619, *n.*; *Ames v. Rathbun*, 55 Barb. 194; S. C., 37 How. 289.

If, however, the objection when taken below could not have been obviated, an omission to take it there does not prevent a party from subsequently raising it upon appeal. Thus, a defendant is not bound to raise the objection on the trial, that the statute under which the plaintiff sues is unconstitutional, for no act of the plaintiff could obviate such objection. *Brookman v. Hamill*, 54 Barb. 209; S. C. affirmed, 43 N. Y. (4 Hand) 554.

As objections to the decision of a judge on the trial of issues of fact without a jury must necessarily be taken after trial, the Code provides that, for the purpose of moving for a new trial under the provisions of section 268, either party may except to the decision at any time within ten days from the notice of the filing thereof; and objections so taken may, as a matter of course, be heard for the first time on the motion at the general term.

c. Harmless errors. A verdict will not be set aside and a new trial granted, even on a bill of exceptions, on account of an error, where it is manifest that no injustice has been done. *Ledyard v. Jones*, 7 N. Y. (3 Seld.) 550; *Wells v. Cone*, 55 Barb. 585; *Page v. Ellsworth*, 44 id. 636. And much less in such case will a new trial be granted if the motion is made upon a case. *Val-lance v. King*, 3 Barb. 548; *Hunt v. Fish*, 4 id. 324; *Smith v. Kerr*, 1 id. 155; *Mansfield v. Wheeler*, 23 Wend. 79; *Benjamin v. Smith*, 12 id. 404; *Wells v. Cone*, 55 Barb. 585. It hence follows, that if, upon the undisputed facts of the case, the decision at the circuit is right, although the judge's reason for it was

Trivial claims — Hard actions.

wrong, a new trial will not be granted. *Munro v. Potter*, 22 How. 49; S. C., 34 Barb. 358.

If, however, it be in any way doubtful whether the error complained of may or may not have had a prejudicial effect upon the verdict, a new trial should not be refused. *Clark v. Crandall*, 3 Barb. 612; *Allen v. Way*, 7 id. 585; S. C., 3 Code R. 243; *Green v. Hudson River Railroad*, 32 Barb. 25; S. C. affirmed, 30 How. 593, n.; *Chester v. Dickerson*, 52 Barb. 349. See *Lowery v. Steward*, 3 Bosw. 505; *Renaud v. Peck*, 2 Hilt. 137; *Schenectady & Saratoga Plank Road Co. v. Thatcher*, 11 N. Y. (1 Kern.) 102.

d. Trivial claims. Where a verdict is given in favor of the defendant, and it is apparent from the whole case that the plaintiff can in no event recover more than nominal damages, a new trial will not be ordered, although an error has been committed in the charge. *Hopkins v. Grinnell*, 28 Barb. 533; *McConihe v. New York & Erie R. R. Co.*, 20 N. Y. (6 Smith) 495. And especially is this so in an action where a recovery by the plaintiff would not change his liability for costs. *Ib.*; *Devendorf v. Wert*, 42 Barb. 227. See *Hyatt v. Wood*, 3 Johns. 239; *Rundell v. Butler*, 10 Wend. 119.

So in no case will a new trial be granted where the cause of action is trifling and the suit is merely for costs and vexation. *Fleming v. Gilbert*, 3 Johns. 528; *Hunt v. Burrell*, 5 id. 137; *Van Slyck v. Hogeboom*, 6 id. 270; *Cady v. Fairchild*, 18 id. 129; *Stephens v. Wider*, 32 N. Y. (5 Tiff.) 351. See *Maybee v. Fisk*, 42 Barb. 326; *Seymour v. Deyo*, 5 Cow. 289. And where a verdict has been erroneously given in favor of the plaintiff for nominal damages carrying costs, a new trial will not be ordered if the plaintiff will elect to discontinue without costs. *Fleming v. Gilbert*, 3 Johns. 528.

e. Hard actions. In actions for penalties it is well settled, that a new trial will not be granted, on the ground that the verdict is against the weight of evidence, where such verdict is for the defendant; but there is no such rule or decision where the verdict is in favor of the plaintiff. *East River Bank v. Hoyt*, 22 How. 478. And it has been held that the court will grant a new trial in a penal action, even though the verdict be for the defendant, where they are satisfied that the verdict is in contravention of law, whether the error has arisen from the misdirection of the judge, or from a misapprehension of the law by the

 Defense unconscionable — Relinquishing damages — Costs.

jury, or from a desire on their part to take the exposition of the law into their own hands. *Attorney-General v. Rogers*, 11 Mees. & Wels. 670; 2 D. N. S. 1037; 7 Jur. 704; 12 L. J. Exch. 395. So a new trial will be granted in such action, after a verdict for the defendant, if such verdict has proceeded upon the mistake of the judge. *Lord Selsea v. Powell*, 6 Taunt. 297; *Wilson v. Rastall*, 4 T. R. 753; *Rex v. Mann*, 4 Maule & Selw. 337; *Calcraft v. Gibbs*, 5 Term R. 19.

f. Defense unconscionable. As a general rule the court will not grant a new trial, after a verdict for the plaintiff, where the defense set up is unconscionable (*Wilkinson v. Payne*, 4 T. R. 468; *Smith v. Page*, 644; *Macrow v. Hull*, 1 Burr. 11; *Farewell v. Chaffey*, id. 54; *Burton v. Thompson*, 2 id. 664), and the verdict has been found according to the justice, conscience and equity of the case. *Wilkinson v. Payne*, *supra*. See *Aylett v. Lowe*, 2 Wm. Bla. 1221; *Edmondson v. Machell*, 2 T. R. 4; *Fletcher v. Webb*, 11 Price, 381; *Cox v. Kitchin*, 1 Bos. & Pul. 338.

g. Relinquishing damages. It is the well-settled practice of the court, on a motion for a new trial, to refuse to set aside the verdict, where the parties consent to deduct any amount deemed excessive. *Clapp v. Hudson River R. R. Co.*, 19 Barb. 461; *Sears v. Conover*, 33 How. 324; S. C., 3 Keyes, 113; affirming S. C., 34 Barb. 330; *Murray v. Hudson River R. R. Co.*, 47 id. 196. But, in an action for a malicious prosecution, the general term have no power to order the reduction of the verdict to a sum named by them as the alternative of a new trial. *Cassin v. Delany*, 38 N. Y. (11 Tiff.) 178; S. C., 6 Abb. N. S. 1; 6 Trans. App. 199; reversing S. C., 1 Daly, 224.

Section 6. Costs.

a. In general. The terms, as to costs on granting a new trial, have already been noticed in a previous section. *Ante*, p. 441, and see Costs, where the subject is fully discussed.

It may be observed, generally, that, where a new trial is granted on the ground that the verdict is against evidence, it must be on payment of the costs of the former trial, by the party against whom the verdict was rendered. *North v. Sergeant*, 33 Barb. 350; S. C., 20 How. 519; *Overing v. Russell*, 28 id. 151; *East River Bank v. Hoyt*, 22 id. 478. And a motion for a new trial, on the ground of newly-discovered evidence, is so far an enumerated motion as to entitle the successful party, upon its deter-

Preparing case for court of appeals—Appeal, when advisable.

mination, to costs, as on the argument of a case. *Warner v. Western Trans. Co.*, 5 Rob. 490.

As to costs on a motion for a new trial, on a case or exceptions at special term, see *Jackett v. Judd*, 18 How. 385; *Malan v. Simpson*, 12 Abb. 225; S. C., 20 How. 488.

Section 7. Preparing case for court of appeals.

a Appeal; when advisable. In allowing appeals to the court of appeals, from orders granting or refusing new trials, the Code provides that no appeal to the court of appeals, from an order *granting* a new trial on a case made or a bill of exceptions, shall be effectual for any purpose, unless the notice of appeal contain an assent, on the part of the appellant, that, if the judgment be affirmed, judgment absolute be rendered against him; and that, upon every appeal from an order granting a new trial on a case made or exceptions taken, if the court of appeals shall determine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant. Code, § 11. The question, whether it is or is not advisable to appeal from an order granting a new trial, under the conditions imposed by the Code, is one of great importance. By stipulating, as required by the Code, the appellant will incur the peril of an adverse decision upon any one of several exceptions, none of which, or all together, may present questions which, if decided adversely to him, would be necessarily fatal to the action; while, on the other hand, by not appealing, but submitting to the delay and expense of a new trial, he may be able, on such trial, to obviate every objection to a recovery. It follows that an appeal to the court of appeals, from an order granting a new trial, in an action tried by a jury, will be proper and advisable only when the order has been granted upon a record presenting questions of law only; and also where the record presents no question or exception upon which the order could be sustained in the court of appeals, except such as, if decided adversely to the appellant, would be necessarily fatal to his action or defense on a new trial, so that in no aspect can his case be varied and put in a better form upon a re-trial. In such a case the delay and expense of a new trial would be unavailing, and the party would hazard nothing by the appeal. *Dickson v. Broadway & Seventh Avenue R. R. Co.*, 47 N. Y. (2 Sick.) 507.

An appeal from an order refusing a new trial is always advis-

Case, how prepared.

able when the interests involved will warrant the proceeding, and the merits of the application are reasonably apparent.

b. Case; how prepared. As the court of appeals will take cognizance of errors of law only, and not errors of fact, except where the trial is by the court or a referee (see *East River Bank v. Kennedy*, 4 Keyes, 279; *Dickson v. Broadway & Seventh Avenue R. R. Co.*, 47 N. Y. [2 Sick.] 507, 511), it becomes necessary, for the purposes of an appeal to that tribunal, to expunge from the case, as originally prepared, all the detailed statements of evidence. See *Moore v. Westervelt*, 1 Code R. N. S. 415. A case, containing exceptions, raising questions of law, is made, and those questions only can be considered. *East River Bank v. Kennedy*, 4 Keyes, 279. See *Livingston v. Radcliff*, 2 N. Y. (2 Comst.) 189; S. C., 3 How. 417.

Where the exceptions are in the first instance stated in a case containing matter not necessary to present the legal questions arising upon them, the party desiring a review in the court of appeals should procure the exceptions, to be separated from the case by or under the direction of the court below, or a justice thereof; and if it does not appear from the return, either that the exceptions were in the first instance stated separately, or that they were separated from the case in which they were originally stated under the direction of the court below, or a judge thereof, the appeal will be dismissed. *Zabriskie v. Smith*, 11 N. Y. (1 Kern.) 480.

This rule, relating to the dismissal of an appeal, is also applicable to cases tried by the court or by referees. The finding of the court or referees must settle the material facts in the case, and they must come up in that shape, and not in a detail of the evidence. *Griscom v. The Mayor of New York City*, 12 N. Y. (2 Kern.) 586; *Newton v. Bronson*, 13 N. Y. (3 Kern.) 587; *Colie v. Brown*, 1 Code R. N. S. 416; *Plato v. Reynolds*, 27 N. Y. (13 Smith) 586. And this finding must be made separately in the manner prescribed by sections 268 and 272 of the Code. See *Johnson v. Whitlock*, 12 How. 571; S. C., 13 N. Y. (3 Kern.) 344; *Hunt v. Bloomer*, 13 N. Y. (3 Kern.) 341; *Cowen v. Village of West Troy*, 43 Barb. 48; *People v. Albany & Susquehanna Railroad Co.*, 57 id. 204, 210.

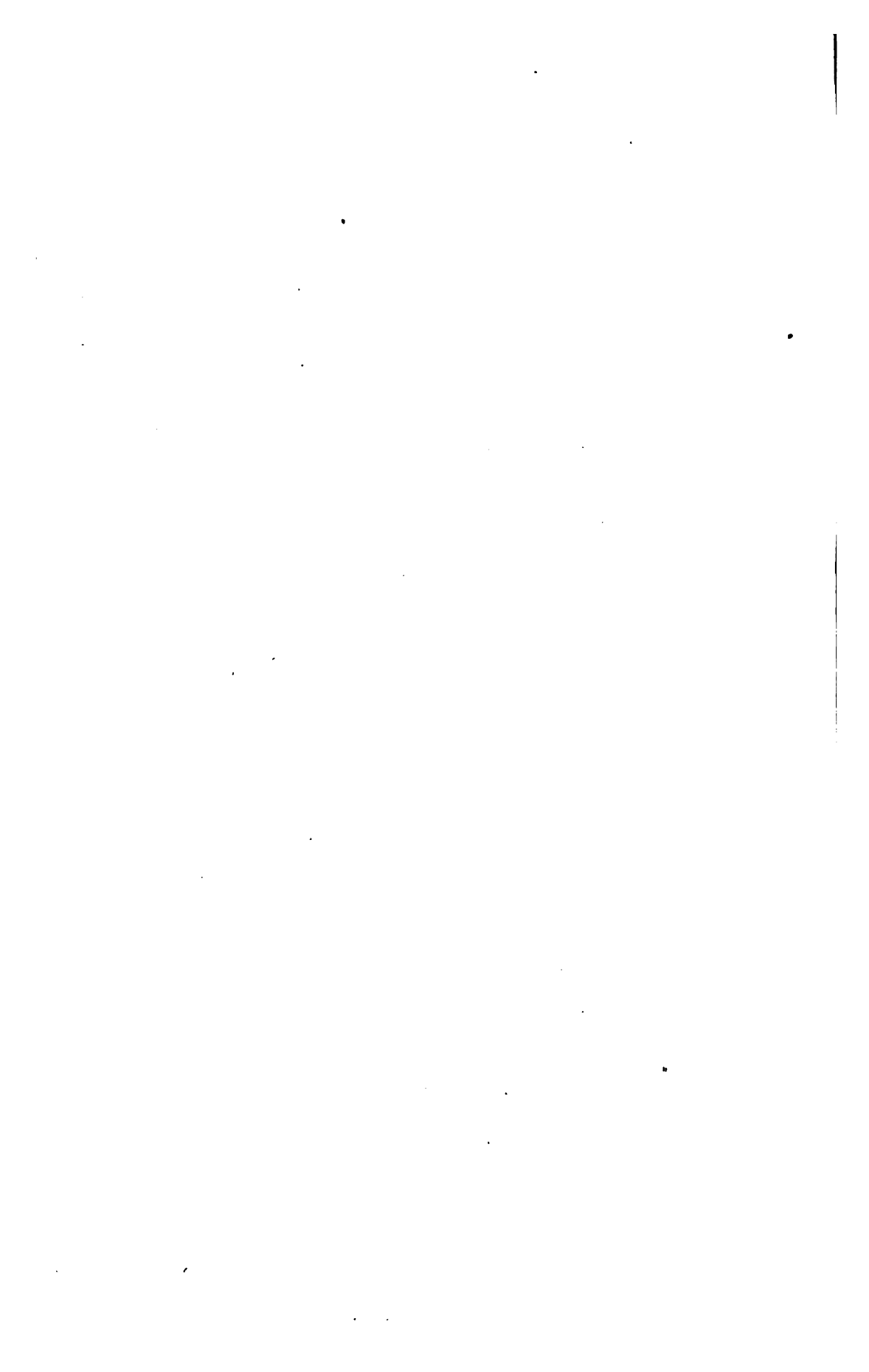
Application for a resettlement of a bill of exceptions must be made to the court below, even though the return has been actually filed; and it is not necessary to first make application

Case, how prepared.

to the court above for a remitter of the record. *Witbeck v. Waine*, 8 How. 433.

Where it appears that certain questions of law were actually and distinctly presented by exceptions taken at the trial, although they are imperfectly stated, the court of appeals will, on motion, stay the argument of the cause, in order to afford the appellant an opportunity to make application to the court below for a resettlement according to the facts; and the return, after amendment, will be allowed to retain its original date of filing. *Livingston v. Miller*, 7 How. 219.

It is provided by section 268 of the Code, that "no finding of facts by the general term shall be required for the purpose of review in the court of appeals, and, if the judgment be reversed at the general term, it shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal; and, in that case, the question whether the judgment should have been reversed, either upon questions of fact or of law, shall be open to review by the court of appeals. And for the purposes of an appeal from a judgment rendered on a report of a referee, or the decision of a judge on a trial without a jury, it shall not be necessary to insert at large in the case the findings of fact or conclusions of law of such judge or referee, or the exceptions thereto filed; but, if the same appear as part of the judgment-roll, they may be referred to and used on the argument of the appeal with the same effect as though inserted in the case."



PART IX.

COSTS.

CHAPTER I.

OF COSTS IN GENERAL.

ARTICLE I.

GENERAL PRINCIPLES.

Section 1. In general.

a. Right to, on what founded. At common law, neither the plaintiff nor the defendant was entitled to costs, professedly as such, and the right to them must be regarded as wholly of statutory origin. 2 Inst. 288; *The Supervisors of Onondaga v. Briggs*, 3 Denio, 173. Previous, however, to the enactment of any statute on the subject, although costs were not given to either party, yet, if the plaintiff did not prevail in his action, he was amerced for his false claim, which went to the king; and if he did prevail, then the defendant was similarly amerced for his unjust detention of the plaintiff's right; but the plaintiff received no indemnity for the costs to which he had been subjected in obtaining his right. Gilb. Hist. C. P. 260, 265.

Costs *eo nomine* were introduced by the statute of Gloucester (6 Edw. I, ch. 1, § 2), by the provisions of which the plaintiff was entitled to costs in all cases in which he recovered damages; and the courts then began to make it a rule that the jury should tax the damages and costs separately, so that it might appear to the court that the costs were not considered in the damages. Gilb. C. P. 267.

The statute of Gloucester was followed by other statutory enactments relating to the same subject, all of which were substantially re-enacted, at an early period, in this State. See 1 R. L. 1813, ch. 96, p. 343. And, in a modified form, their provisions were subsequently incorporated into the Revised Statutes. See 2 R. S. 612, 635.

Reasons for allowing—Costs under the Code.

Under these various statutes, costs principally consisted of the fees allowed to attorneys and counsel for their services in the management of the proceedings; but they also included the fees paid to the other officers of the court, fees of witnesses, and such other disbursements as became necessary in the progress of the action. 1 Burr. Pr. 271.

The costs awarded by the judgment, under the provisions of the statute, belonged to the attorney, and hence it was a rule, that a party, not an attorney, conducting a suit or defense in person, was not entitled to costs (*Stewart v. New York C. P.*, 10 Wend. 597), although he might recover his disbursements. *The People v. Steuben C. P.*, 12 Wend. 200.

Costs in chancery were not dependent upon any statutory provisions, but, for the most part, they rested in the sound discretion of the court, which was exercised under a consideration of all the circumstances of each particular case. *Eastburn v. Kirk*, 2 Johns. Ch. 317.

b. Reasons for allowing. The reasons for giving costs to the successful party in an action seem to be founded in a principle of natural justice; for if a person commit an injury, or resist an honest claim, it is but just that he should be compelled to make compensation, not only for the principal injury, but also as an indemnity to the injured party for the costs and expenses necessarily incurred in obtaining redress in the proper court.

So, on the other hand, if the suit or proceedings instituted by the plaintiff should prove to be groundless, he should be compelled to defray the reasonable costs expended by the defendant in resisting the unjust claim.

The above principle was recognized, and is thus briefly stated by the framers of the Code in their report to the legislature: "The losing party ought, as a general rule, to pay the expense of the litigation. He has caused a loss to his adversary unjustly, and should indemnify him for it. The debtor who refuses to pay ought to make his creditor whole." Code Com. Rep. 1848, p. 208.

c. Costs under the Code. The provisions of the Code, regulating the subject of costs, are embraced within title X, part II, of that instrument, and through the operation of these provisions a complete and radical change has been brought about, and an entirely new system of costs substituted for the old system previously existing.

Costs under the Code.

The change referred to is thus indicated by section 303, which provides that "all statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil actions, and all existing rules and provisions of law restricting or controlling the right of a party to agree with an attorney, solicitor or counsel for his compensation, are repealed; and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties. But there may be allowed to the prevailing party, upon the judgment, certain sums, by way of indemnity, for his expenses in the action; which allowances are in this act termed costs."

Costs, under the Code, are composed:

1. Of the certain sums allowed in lieu of attorney's fees.
2. Of the fees of officers.
3. Disbursements, such as postage, witnesses' fees, printing bills, etc. (*Belding v. Conklin*, 4 How. 196; S. C., 2 Code R. 112; *Wheeler v. Westgate*, 4 How. 269); and it will be observed that, as between the parties to the action, these sums are, by the above section, expressly awarded to the prevailing party; and, even when the judgment is for costs alone, such party is *prima facie* entitled to it. *Martin v. Kanouse*, 11 How. 567. The Code, however, still recognizes the right of the attorney to his lien for his services in the action, and this right will be protected now as formerly. *Sherwood v. Buffalo & New York City Railroad Co.*, 12 How. 136. See vol. 1, pp. 246 to 248, where this subject is fully discussed.

Costs do not become a debt against either party to an action, unless he expressly agrees to pay them, until the recovery of judgment in favor of the opposite party. *Torry v. Hadley*, 14 How. 357; *Warfield v. Watkins*, 30 Barb. 395. If a settlement before judgment is made without any provision for the payment of costs, the plaintiff loses them. *Ib.* But if such settlement be made in fraud of the plaintiff's right to costs, the rule is otherwise. *Bogardus v. Richtmeyer*, 3 Abb. 179. See, also, *Taylor v. Rennie*, 22 How. 101.

Where a second suit is brought for the same cause of action, a stay of all proceedings on the part of the plaintiff, in such suit, will be ordered, until the costs of the first suit are paid (*Edwards v. The Ninth Avenue R. R. Co.*, 22 How. 444; *Richardson v. White*, 27 id. 155); but, where the nature of the relief sought

What statute controls — Interlocutory or final costs.

in the two proceedings is not identical, the above rule is not applicable. *Davis v. Duffie*, 5 Duer, 688; S. C., 3 Abb. 363.

d. What statute controls. The right of a party to costs, under the Code, is governed exclusively by statute; and the statute which is in force at the time of the recovery of the judgment under which costs are claimed, is held to be controlling. *Fisher v. Hunter*, 15 How. 156; *Huber v. Lockwood*, 15 id. 74; *Cook v. The New York Floating Dry Dock Co.*, 1 Hilt. 556; *Crory v. Norwood*, 5 Abb. 219. See *Steward v. Lamoreaux*, 5 id. 14, in which case the defendants failed to answer, and it was held that the costs were to be governed by the statute existing at the time of taxation, without regard to the time when the default actually occurred.

Where the cause is tried by a jury, the right to costs is regulated by the statute in force at the time the verdict is rendered. *Moore v. Westervelt*, 14 How. 279; S. C., 6 Duer, 684; *Burnett v. Westfall*, 15 How. 420; *Cook v. New York Floating Dock Co.*, 1 Hilt. 556; *Scudder v. Gori*, 28 How. 155; S. C., 18 Abb. 207; 3 Rob. 629. And where the cause has been tried more than once, by the statute in force at the time of the *final* verdict. *Jones v. Underwood*, 18 How. 532; *Jackett v. Judd*, id. 385. If the cause is tried by the court without a jury, costs are regulated by the statute in force at the time of the making and filing of the decision. *Hunt v. Middlebrook*, 14 How. 300. If tried by a referee, at the time the report is filed. *Torry v. Hadley*, 14 How. 357. See *Hunt v. Middlebrook*, 14 How. 300.

e. Interlocutory or final costs. A distinction is made between *interlocutory* and *final* costs, which is important to be remembered, as the times and modes of collecting them are materially different.

Interlocutory costs are such as arise out of the intermediate stages of the action, and are allowed on special motion, on which an order is granted, deciding some intervening matter in the cause, without any reference to its final event.

Final costs include all other costs, and are allowed upon the termination of the action by judgment, in favor of one party or the other. See *Mora v. Sun Insurance Co.*, 22 How. 60; S. C., 13 Abb. 304.

Costs awarded on a demurrer to part of a pleading are final, and not interlocutory costs. *Palmer v. Smedley*, 13 Abb. 185; *Mora v. Sun Insurance Co.*, 22 How. 60; S. C., 13 Abb.

Costs, when proceedings void — In actions pending in 1848.

304. See *Henderson v. Jackson*, 2 Sweeny, 603; S. C., 9 Abb. N. S. 293; 40 How. 168. And the same has been held, as to costs on a motion granting judgment for the frivolousness of a demurrer. *Wesley v. Bennett*, 6 Abb. 12. See *Bernhard v. Kapp*, 11 Abb. N. S. 342; *Hill v. Simpson*, id. 343.

f. Costs, when proceedings void. On the dismissal of an action for want of jurisdiction, the New York superior court holds that the defendant is entitled to costs. *McMahon v. The Mutual Benefit Life Ins. Co.*, 8 Abb. 297; S. C., 3 Bosw. 644; *Donnelly v. Libby*, 1 Sweeny, 259. And the same doctrine has also been held by the supreme court, in *King v. Poole*, 36 Barb. 242; and in *Cumberland Coal Co. v. Hoffman Coal Co.*, 39 id. 16; S. C., 15 Abb. 78. See, also, *McMahon v. Mutual Benefit Life Ins. Co.*, 12 id. 28. But the court has no power to award costs on dismissing proceedings for a want of jurisdiction which appears on the face thereof. *Humiston v. Ballard*, 40 How. 40; reversing S. C. on this point, 39 id. 93; *Gormly v. McIntosh*, 22 Barb. 271; *Harriott v. The New Jersey R. R. & Trans. Co.*, 1 Daly, 377; reversing S. C., 8 Abb. 284.

g. On improper pleadings. An improper or unauthorized pleading, being a mere nullity, can raise no issue to be tried, and hence no costs can be allowed for a trial had thereon. *Sleight v. Hancox*, 4 Abb. 245.

A demurrer to an answer which does not contain new matter constituting a counter-claim, has been held to be such an unauthorized pleading as to be considered a mere nullity. *Richtmyer v. Haskins*, 9 How. 481; *Roosa v. The Saugerties & Woodstock Turnpike Road Co.*, 8 id. 237; *Perkins v. Farnham*, 10 id. 120. See *Robinson v. Judd*, 9 How. 378; *Bass v. Comstock*, 36 id. 382; S. C., 38 N. Y. (11 Tiff.) 21; 5 Trans. App. 22.

h. In actions pending in 1848. The provisions of the Code, relating to costs, have been construed as having no application to the costs in suits pending prior to July 1, 1848, with the single exception of costs of motions therein, on a final determination in the court of appeals. *Doty v. Brown*, 4 How. 429; *Truscott v. King*, id. 173.

The old chancery fee bill was not repealed by the Code, but it has been held to be applicable only to proceedings had prior to July 1, 1851, in equity suits commenced before the Code. *Curtis v. Leavitt*, 1 Abb. 118; S. C., 19 Barb. 530.

Common-law actions pending in courts of record when the
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To defendants.

Code took effect, but tried afterward, are to be governed as respects costs by the previous statutes. But costs of the proceedings, subsequent to the verdict, are governed by the provisions of the Code. *McMasters v. Vernon*, 4 Duer, 625; S. C., 1 Abb. 179; *Fitch v. Livingston*, 4 Sandf. 712; *Rich v. Husson*, 1 Duer, 617; S. C., 11 N. Y. Leg. Obs. 119.

i. To defendants. It is provided, by section 305 of the Code, that costs shall be allowed of course to the defendant in the actions mentioned in section 304, unless the plaintiff be entitled to costs therein.

On the dismissal of an action, the defendant is, *prima facie*, entitled to costs; and, if the plaintiff would escape the operation of the general rule, he must bring himself within some one of the exceptions to it. *Banta v. Marcellus*, 2 Barb. 373.

The object and design of the above section is to indemnify each defendant who shall be unjustly brought into court, and compelled to defend himself against an unfounded claim. Hence, in an action for a tort, where a verdict is rendered in favor of certain of the defendants and against others, the defendants prevailing are entitled, of course, to costs, under section 305, although all the defendants had joined in a single answer. *Daniels v. Lyon et al.*, 9 N. Y. (5 Seld.) 549; *Decker v. Gardiner*, 8 N. Y. (4 Seld.) 29. See *Hinds v. Myers*, 4 How. 356; S. C., 3 Code R. 48; *Brown v. Bowen*, 16 How. 544; *Contra, Bulkley v. Smith*, 1 Duer, 704. And the same rule has been held to be applicable as to costs in actions on contracts. *Corbett v. Ward*, 3 Bosw. 632. See *Bridgeport Fire & Marine Ins. Co. v. Wilson*, 20 How. 511; S. C., 7 Bosw. 699; 12 Abb. 209. But where two defendants, sued on the same instrument, both appear by the same attorney, and interpose substantially the same defense, although by separate answers, only one bill of costs can be allowed on their prevailing in the action. *Atkins v. Lefever*, 5 Abb. N. S. 221.

Where the defense of infancy is set up by one of several defendants, the plaintiff may, as to him, discontinue the action without costs, on application to the court before trial. But, if the infant is obliged to establish his infancy, he is entitled to costs. *Cuyler v. Coats*, 10 How. 141. And where two defendants are jointly liable, and process has been served only upon one, if the one not served moves that the plaintiff be compelled to receive his answer, which sets up the sole defense of infancy,

To defendants.

the plaintiff should be allowed to discontinue without costs as to such defendant, except the costs of the motion. *Wellington v. Classon*, 9 Abb. 175; S. C., 18 How. 10; *Waterbury Manufacturing Co. v. Krause*, 1 Hilt. 560; S. C., 9 Abb. 175, *n*.

Neither party to an action is entitled to costs, where the plaintiff recovers less than \$50, although he extinguishes a counterclaim set up in the answer which exceeds that amount. *Kalt v. Lignot*, 3 Abb. 190; affirming S. C., *id.* 33; 12 How. 535. See *Landsberger v. The Magnetic Telegraph Co.*, 8 Abb. 35; *Boston Mills v. Eull*, 6 Abb. N. S. 319; S. C., 37 How. 299; 1 Sweeny, 359. If, however, the action is one of which a justice of the peace has no jurisdiction, the plaintiff may recover costs, although his verdict is for less than \$50 after extinguishing a set-off. *Ib.* See *Contra, Crane v. Holcomb*, 8 Abb. 35, 36; S. C. affirmed, 2 Hilt. 269; and see *Griffin v. Brown*, 35 How. 372; S. C., 53 Barb. 428.

Section 305 of the Code is confined to the actions mentioned in section 304, which has no application to foreclosure suits; and where the plaintiff discontinues an action for the foreclosure of a mortgage before judgment, the allowance of costs to the defendants would seem to rest in the discretion of the court. *Gallagher v. Egan*, 2 Sandf. 742; *Pratt v. Ramsdell*, 16 How. 59; S. C., 7 Abb. 340, *n*; S. C. affirmed, 16 How. 62, *n*; *Bartow v. Cleveland*, 7 Abb. 339; S. C., 16 How. 364.

CHAPTER II.

WHAT COSTS ALLOWED ON ENTRY OF JUDGMENT.

ARTICLE I.

WHEN ALLOWED, AND THE AMOUNT.

Section 1. Costs when title to land is in question.

a. In general. Full costs shall be allowed, of course, to the plaintiff, upon a recovery in an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial. Code, § 304, subd. 1.

The term *title*, as used in this section of the Code, means right of possession and not possession in fact, nor mere right of property; and where actual possession is sufficient to maintain the action, evidence in regard to such actual possession does not draw the title in question. *Muller v. Bayard*, 15 Abb. 449. And it has been held, that no question as to title arises in an action to recover damages for the breach of an agreement to convey lands, where the only issue raised is as to whether there was an incumbrance resting upon the lands; as, for example, a right of dower, etc. *Smith v. Riggs*, 2 Duer, 622. Neither is the question as to whether certain fixtures are part of the realty, a question of title within the meaning of the above section. *Burnet v. Kelly*, 10 How. 406; nor is a question (incidentally raised), as to the ownership of land by a third party, a question of title under the statute as to costs. The statute means a contested title as to some particular lands to which the plaintiff claims title. *Ib.*

And the claim of title must be one which is in controversy between the parties, and not a claim the justice of which is conceded by the defendant. *O'Reilly v. Davies*, 4 Sandf. 722. See *Rathbone v. McConnell*, 21 N. Y. (7 Smith) 466; S. C., 20 Barb. 311.

Where the issue is not raised by the pleadings, the only proper evidence that can be received, as to whether or not the title came in question at the trial, is the certificate of the judge who tried the cause. *Niles v. Lindsley*, 1 Duer, 610; S. C., 8 How. 131; *Utter v. Gifford*, 25 id. 289. See *Burnet v. Kelly*, 10 How. 406;

When title arises on the pleadings.

Blake v. James, 19 id. 321. The certificate of a referee that the title to land came in question is of no avail, where, from the pleadings, the court can see that it did not. *Squires v. Seward*, 16 How. 478.

Although the plaintiff may recover a verdict in the action, yet if he fails on the issue of title, it is not a recovery within the meaning of the statute, and he is not entitled to costs under its provisions. *Burhans v. Tibbits*, 7 How. 74. See *Alexander v. Hard*, 42 How. 131; id. 384.

b. *When title arises on the pleadings.* To bring an action within the provisions of section 305, there must be a *real* issue upon the question of title. An immaterial issue is insufficient for this purpose, even though title is alleged in the complaint and denied in the answer. *Rathbone v. McConnell*, 20 Barb. 311; S. C. affirmed, 21 N. Y. (7 Smith) 466.

Where an action is, in substance, the former action of waste, the complaint alleging a forfeiture and praying for a recovery of possession, the plaintiff's title is material. *Snyder v. Beyer*, 3 E. D. Smith, 235. And so a claim of title to growing trees or shrubbery raises an issue of title to land. *Powell v. Rust*, 8 Barb. 567; S. C., 1 Code R. N. S. 172.

A mere license is not an interest in lands, such as to draw the title in question. *Turner v. Van Riper*, 43 How. 33; *Doolittle v. Eddy*, 7 Barb. 74. Hence, a *defense* of leave and license does not raise a question of title. *Rathbone v. McConnell*, 20 Barb. 311; S. C. affirmed, 21 N. Y. (7 Smith) 466; *People v. New York Common Pleas*, 18 Wend. 579; *Wickham v. Seely*, id. 649; *Launitz v. Barnum*, 4 Sandf. 637; *Muller v. Bayard*, 15 Abb. 449; *Utter v. Gifford*, 25 How. 289.

In an action for damages inflicted by the defendant's dog, an answer alleging that the dog was, at the time, on the defendant's premises, and that the plaintiff had no right to be there, does not put in issue a claim of title, so as to entitle the plaintiff to costs under the provisions of the statute. *Pierret v. Møller*, 3 E. D. Smith, 574.

But, in an action for an assault, where the answer states that the place where the trespass is alleged to have been committed is a public highway, a denial of the allegation will bring the title to lands in question. *Dinehart v. Wells*, 2 Barb. 432; *Heath v. Barmour*, 35 How. 1; S. C., 53 Barb. 444; *Hall v. Hodskins*, 30 How. 15. In an action for a trespass upon lands, title is not

 When title arises on the evidence.

a material issue, unless it appears upon the face of the pleadings that the plaintiff is not in possession. *Squires v. Seward*, 16 How. 478; *Miller v. Decker*, 40 Barb. 228; *Rathbone v. McConnell*, 21 N. Y. (7 Smith) 466; S. C., 20 Barb. 311. But where it appears, from the face of the pleadings, that the plaintiff is not in possession, the actual title is in issue, if title is denied. *Niles v. Lindsley*, 1 Duer, 610; S. C., 8 How. 131. The rule is otherwise, however, if title is admitted by the answer. *Wickham v. Seely*, 18 Wend. 649. In that case the right of the plaintiff to recover costs depends upon the amount of the recovery, and is determined by the fourth subdivision of section 304 of the Code. *Turner v. Van Riper*, 43 How. 33.

It was a rule under the Revised Statutes, and in the earlier decisions of the courts, that a claim to an easement, by prescription or grant, was sufficient to raise a question of title, if disputed. *Heaton v. Ferris*, 1 Johns. 146; *Eustace v. Tuthill*, 2 id. 185; *Tunnicliff v. Lawyer*, 3 Cow. 382; *Striker v. Mott*, 6 Wend. 465; *Radley v. Brice*, id. 539. And the same rule seems to be still recognized under the Code. See *Rathbone v. McConnell*, 21 N. Y. (7 Smith) 466; *Utter v. Gifford*, 25 How. 289; *Heath v. Barmour*, 35 id. 1; S. C., 53 Barb. 444.

c. *When title arises on the evidence.* Under the former system of pleading, by pleading the general issue a defendant in trespass put in issue the *right* of possession, as well as the *fact* of possession; and, because the *right* was thus put in issue, the title to the land was in question. But, under the present system, nothing is in issue but what the answer puts in issue; and, if it does not put in issue the right to the possession, but only the fact of the possession, the title to the land is not in question. If the answer does not raise the question, the proofs cannot; unless, from the circumstances of the case, the fact of possession could not be proved without proving a right to the possession. It hence follows that, if the title is not put in issue by the pleadings, or is not *necessarily* proved at the trial, no issue is raised such as to entitle the plaintiff to costs, under the provisions of the Code, section 304, subd. 1. *Burnet v. Kelly*, 10 How. 406. When costs are claimed on the ground that the question of title arises on the evidence, a certificate must be procured, from the judge or referee who tried the cause, of the fact that the title was so in question, and that the plaintiff proved his title. Code, § 304. See *Squires v. Seward*, 16 How. 478; *Turner v. Van Riper*,

Costs in replevin.

43 id. 33. And this certificate is conclusive on the taxation of costs. *Mumford v. Withey*, 1 Wend. 279. The court, however, possesses the power to review the grounds upon which the certificate is granted, and, if found incorrect, it may be set aside, on a direct motion for that purpose. *Barney v. Keith*, 6 Wend. 555.

The certificate may be granted at any time before final judgment, and even after a taxation of costs; but it must be granted by the court, and not by the judge out of court. See *Saratoga & Washington R. R. Co. v. McCoy*, 9 How. 339; *Woolley v. Whitby*, 2 Barn. & Cr. 580; S. C., 4 Dowl. & Ryl. 147; *Johnson v. Stanton*, 2 Barn. & Cr. 621; S. C., 4 Dowl. & Ryl. 156; *Foxall v. Banks*, 5 Barn. & Ald. 536.

Section 2. Costs in replevin.

a. In general. Costs, in an action to recover the possession of personal property, are regulated by subdivisions 2 and 4 of section 304 of the Code. Upon a recovery in such an action the plaintiff is entitled to costs as of course; but if he recover less than \$50 damages he will recover no more costs than damages, unless he recovers also property the value of which, with the damages, amounts to \$50, or the possession of property be adjudged to him, the value of which, with the damages, amounts to \$50; such value to be determined by the jury, court or referee by whom the action is tried. Code, § 304, subd. 2, 4.

Under this section of the Code, upon recovery of less than \$50 damages, the damages recovered are the measure of the costs. Thus, where the plaintiff recovered \$25, and only six cents damages, his costs were assessed at only six cents. *Minks v. Wolf*, 8 How. 238. See *Corbin v. Milton*, 27 How. 76. But a verdict in the plaintiff's favor is sufficient to deprive the defendant of any right to tax his costs as of course, though the recovery be insufficient to carry full costs to the former. *Von Schoening v. Buchanan*, 14 Abb. 185; S. C., 23 How. 164; 14 Abb. 468; affirming S. C., 23 How. 44.

In an action for the possession of personal property, where the defendant before the re-taking of the property, under an equitable defense, tenders an amount which he claims to be the only sum due to the plaintiff, and keeps the tender good, and where upon the trial a verdict is found in favor of the plaintiff for a less sum than the tender, the plaintiff in his judgment is not entitled to costs. *Archer v. Cole*, 22 How. 411.

Costs in actions for torts to person or character.

And where, in an action to obtain the delivery of personal property, the plaintiff has a verdict for the return of a portion of the property, and the defendant a verdict *for the residue*, each party is entitled to costs against the other. *Porter v. Willet*, 14 Abb. 319; *Summers v. Jarvis*, id. 322 n. If the plaintiff resort to any other form of action, for the possession of personal property, he can tax no costs at all against the defendant, where his recovery is less than \$50, though he may have actually succeeded in possessing himself of the property. Thus, an action for damages was brought against the defendant, for entering the plaintiff's premises and taking possession of certain personal property. The plaintiff obtained an injunction to restrain the defendant from meddling with the property, and then sold the goods himself and received the avails. On the trial the defendant proved that a portion of the property belonged to him, and he recovered a judgment against the plaintiff, for the conversion thereof, for a sum over \$50; and it was held that from the form of the action and the mode of procedure which the plaintiff had adopted, the defendant must be considered as the successful party, and was, therefore, entitled to costs. *Ashley v. Marshall*, 9 Abb. 361; S. C., 19 How. 110; 30 Barb. 426; S. C. affirmed, 29 N. Y. (2 Tiff.) 494.

Section 3. Costs in actions for torts to person or character.

a. In general. Costs shall be allowed, of course, to the plaintiff in an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction. But if, in any such action, he recover less than \$50 damages, he shall recover no more costs than damages. Code, § 304, subd. 4.

Disbursements are included in the costs allowed, and, therefore, where a plaintiff recovers less than \$50 in an action for a tort, he is not entitled to recover the fees of officers and disbursements, in addition to the amount of costs equal to the verdict. *Belding v. Conklin*, 4 How. 196; *Wheeler v. Westgate*, id. 269; *Stone v. Duffy*, 3 Sandf. 761; S. C., 1 Code R. N. S. 129.

b. In New York city. It is provided by statute, that "the marine court of the city of New York shall have jurisdiction over and cognizance of actions of assault and battery, false imprisonment, malicious prosecution, libel and slander, where the damages claimed do not exceed \$500; and the costs in all such actions, when prosecuted in any other court in the city of

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New York, are hereby limited to the amount which would have been recovered in said marine court if prosecuted therein ; but in no such action shall the costs exceed the damages recovered." Laws of 1853, ch. 617, § 1. See Laws 1873, ch. 453, as to the present jurisdiction of this court.

Whether or not any action above named is within the provisions of this statute is to be determined by the amount claimed, and not by the amount recovered. Thus, where in such an action brought in a court of record the damages claimed exceed \$500, if the plaintiff recover, his right to costs will be regulated by the provisions of the Code. *Murray v. De Gross*, 12 N. Y. Leg. Obs. 311 ; S. C., 3 Duer, 668.

The provisions of the statute are applicable only to actions commenced in the city of New York, and not to an action commenced in another county and afterward transferred to the city and county of New York. *Sleight v. Hancox*, 4 Abb. 245.

Section 4. When justices' courts have no jurisdiction.

a. In general. Costs shall be allowed, of course, to the plaintiff upon a recovery in actions of which a court of a justice of the peace has no jurisdiction. Code, § 304, subd. 3.

This subdivision of section 304 gives costs to the plaintiff upon a recovery for any amount in the actions in which a justice of the peace has no jurisdiction. The actions of which a justice *has* jurisdiction, as conferred by statute, are specified in section 53 of the Code.

The actions in which he has no jurisdiction are specified in section 54. When actions, of which a justice of the peace has no jurisdiction, are spoken of in section 304 of the Code, those only are referred to that are expressly withdrawn from the jurisdiction of such officer by section 54 of that act. *Turner v. Van Riper*, 43 How. 33 ; *Blank v. Westcott*, 7 Abb. N. S. 225 ; *Pinder v. Stoothoff*, id. 433. Jurisdiction of the action, and not of the claim of damages, is made to determine the plaintiff's right to costs if the recovery be for less than \$50. *Ib.* Thus, a justice has no jurisdiction of an action on a note, or other contract, although the damages claimed may exceed \$200, but, because of the amount, he cannot try it ; yet, if the action is brought in the supreme court, and the plaintiff recover less than \$50, he will not be entitled to costs as, of course, under subdivision 3 of section 304 of the Code. *Blank v. Westcott*, 7 Abb. N. S. 225. So a justice of the peace has jurisdiction of an action for

When justices' courts have no jurisdiction.

damages for injury to rights pertaining to the person, but cannot try it if the damages claimed exceed \$200; yet, if the action is brought in the supreme court, and the damages claimed exceed \$200, the plaintiff cannot have costs unless the amount of the recovery exceeds \$50. *Pinder v. Stoothoff*, 7 Abb. N. S. 433.

The principal questions which have arisen as to the actions of which a justice has no jurisdiction, have reference to the class of cases specified in subdivision 4, section 54 of the Code, namely, "a matter of account where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed \$400."

Under these provisions of the Code it has been decided that a plaintiff who sues in a court of record in an action arising on contract and for the recovery of money only, and proves contested demands which, with those established by the defendant, exceed \$400 in amount, is entitled to costs as a matter of course, if he recovers any sum whatever. *Stilwell v. Staples*, 3 Abb. 365; S. C., 5 Duer, 691; *Griffen v. Brown*, 35 How. 372; S. C., 53 Barb. 428. The admission by the defendant at the trial of such matters of account is sufficient proof thereof to entitle the plaintiff to costs in such a case. *Ib.*

A plaintiff is not compelled to first commence his action in a justice's court. It is enough to entitle him to costs, if the facts as proved on the trial, in the supreme court, show it to be a case of which a justice has no jurisdiction. *Glackin v. Zeller*, 52 Barb. 147; *Stilwell v. Staples*, 3 Abb. 365; S. C., 5 Duer, 691; *Ryan v. Doyle*, 40 How. 215; *Lund v. Broadhead*, 41 *id.* 146.

The adjudication of the justice before whom the cause is first tried is conclusive upon the question as to the amount of the accounts of both parties; and, after such adjudication, the plaintiff is bound to commence his action in the supreme court, and is entitled to costs upon the recovery of any amount in that court. *Bailey v. Stone*, 41 How. 346; *Fuller v. Conde*, 47 N. Y. (2 Sick.) 80.

The case of mutual accounts, intended by the statute, is where each party has a claim against the other upon which either party might sue. *Brady v. Durbrow*, 2 E. D. Smith, 78; *Griffen v. Brown*, 35 How. 372; S. C., 53 Barb. 428. Mere payments, made toward satisfying a debt, are held not to be items of account

Actions to recover money only.

within this rule. *Crim v. Cronkhite*, 15 How. 250; *Hoodless v. Brundage*, 8 id. 263. See *Lund v. Brodhead*, 41 id. 146.

In an action commenced in a justice's court, and transferred to the supreme court on a plea of title, and where the plaintiff succeeds upon one cause of action only, and that recovery is less than \$50, and he fails as to the others, upon which the defendant succeeds, the plaintiff must still be allowed costs, where there is no certificate of the court that title to real property came in question on the trial. Code, § 61; *Blake v. James*, 19 How. 321. See *Morss v. Salisbury*, 48 N. Y. (3 Sick.) 636.

Those issues to which the plea of title is not interposed should not be taken to the supreme court, and, if they are, they have no influence on the question of costs. *Morss v. Jacobs*, 35 How. 90. Thus, where damages are given to the plaintiff for trespasses on land to which the defendant omitted to plead title, the plaintiff is not entitled to costs unless he recovers \$50. *Ib.* So where the defendant admits the title of land to be in the plaintiff, but justifies the alleged trespass on the ground of license, the question of title does not arise, and the plaintiff, on recovering less than \$50, is not entitled to costs. *Craven v. Price*, 37 How. 15; S. C., 53 Barb. 442; *Turner v. Van Riper*, 43 How. 33.

Section 5. Actions to recover money only.

a. In general. In an action for the recovery of money, the plaintiff is entitled to costs, as of course, if he recover \$50. Code, § 304, subd. 4.

This provision of the Code is held to be applicable only in an action where the plaintiff merely seeks to recover a judgment for money only, and does not include actions in which relief, other than a judgment for money, must be granted, in order to enable him to maintain the action. *Buchanan v. Morrell*, 13 How. 296; S. C., 6 Duer, 658; *Guilhon v. Lindo*, 9 Bosw. 601.

An action commenced against a railroad company, to recover a fine imposed by statute, was held to be a civil action for the recovery of money, and the plaintiff was allowed costs under the provisions of section 304. *People v. New York Central R. R. Co.*, 28 Barb. 284. So in an action upon a promissory note, brought against the representatives of a deceased joint debtor, upon the insolvency of the survivor, in which the surviving joint debtor was made a co-defendant and a recovery had in favor of the plaintiff, it was held that, under this section of the Code (304), the plaintiff was entitled to costs. *Yorks v. Peck*, 9 How. 201.

Actions to recover money only — Separate issues.

In estimating the amount of the plaintiff's recovery, for the purpose of determining his right to costs, the damages assessed are alone to be taken into account, and unless the damages recovered by him amount to \$50, exclusive of the costs assessed by the jury, the defendant recovers full costs. *Scoville v. Kent*, 8 Abb. N. S. 17; *Van Horne v. Petrie*, 2 Cai. 213; *Seaman v. Bailey*, id. 214. See *Troy City Bank v. Grant*, 1 How. 135.

Costs will be allowed of course to the defendant if the action is decided in his favor. Code, § 305. See *ante*, chap. 1, art. 1, § 1 *i*, p. 458.

"When several actions are brought on one bond, recognizance, promissory note, bill of exchange, or other instrument in writing, or in any other case, for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided that the party or parties proceeded against in such other action or actions shall, at the time of the commencement of the previous action or actions, have been within this State, and not secreted." Code, § 304, subd. 4.

It is provided by section 310 of the Code, that "when the judgment is for the recovery of money, interest from the time of the verdict or report until judgment be finally entered shall be computed by the clerk, and added to the costs of the party entitled thereto." And by the provisions of a recent statute, it shall be lawful for any party to a suit, who shall have obtained a verdict or a report of referees in his favor to tax interest upon the amount of such verdict or report, as costs, from the time of the obtaining of the same to the time of the perfecting judgment therein." Laws of 1869, ch. 807, § 3.

Where a clerk is authorized to compute interest on the report of a referee under section 310 of the Code, such interest should be computed from the time of making the report, and not from its date. *Fuller v. Squire*, 8 How. 121. See, also, *Hoffm. Pr.* 112; *Hunn v. Norton*, *Hopk.* 344.

Section 6. Separate issues.

a. In general. The provisions of the Revised Statutes (2 R. S. 617, § 26), that "when there are two or more distinct causes of action in separate counts, the plaintiff shall recover costs on the issues found for him, and that the defendant shall recover on

Several defendants — Separate bill of costs.

those found in his favor," have been held to be unrepealed by the Code; and where several distinct causes of action are stated in the complaint, on some of which the plaintiff succeeds, and on others the defendant, the rule as to costs is the same as under the Revised Statutes, if the action is one in which costs are a matter of right. *Dresser v. Wickes*, 2 Abb. 460. See *Porter v. Willet*, 14 Abb. 319.

b. Several defendants. "In all actions where there are several defendants, not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them." Code, § 306.

This clause of section 306, as amended in 1851, and as it now stands, is intended to include all actions, whether of a legal or equitable nature, where the circumstances therein mentioned exist. *Wilklow v. Bell*, 18 How. 397; *Bank of Attica v. Wolf*, 18 id. 102. See *Bulkley v. Smith*, 1 Duer, 704; *Williams v. Horgan*, 13 How. 138; S. C., 6 Duer, 658. And in all such cases the granting or refusing of costs rests in the discretion of the court, and such defendants cannot tax their costs as of course. *Wilklow v. Bell*, 18 How. 397. The following cases, *Daniels v. Lyon*, 9 N. Y. (5 Seld.) 549; *Stone v. Duffy*, 3 Sandf. 761; *Decker v. Gardner*, 8 N. Y. (4 Seld.) 29, and *Hinds v. Myers*, 4 How. 356; S. C., 3 Code R. 48, were decided under the provisions of section 306, before the amendment of 1851. *Brown v. Bowen*, 16 How. 544, which follows the above decisions, was decided without taking the amendment of 1851 into consideration. See *Wilklow v. Bell*, 18 How. 397.

In an action of the class under consideration, it is in the discretion of the court to restrict the defendants to one bill of costs, or to allow a separate bill to each or some of them, according to the circumstances of the case. *Harper v. Chamberlain*, 14 Abb. 408. But where several defendants, *not* united in interest, or, being so united, do not make a separate defense by separate answers, but unite in a general denial as their answer, such as are entitled to judgment, on the plaintiff's failure to recover against all, are entitled to costs, of course. *Daniels v. Lyon*, 9 N. Y. (5 Seld.) 549; *Decker v. Gardiner*, 8 N. Y. (4 Seld.) 29; *Zink v. Attenburg*, 18 How. 108; *Corbett v. Ward*, 3 Bosw. 632.

c. Separate bill of costs. Defendants, however numerous, appearing by one attorney, are entitled to recover but one bill of

 Separate bill of costs—Costs to plaintiff.

costs, on succeeding in the action, although they may have put in separate answers. *Castellanos v. Beauville*, 2 Sandf. 670; *Braden v. Kakhaizer*, 3 id. 760; S. C., 1 Code R. N. S. 129; *Tracy v. Stone*, 5 How. 104; S. C., 3 Code R. 73; *Atkins v. Lefever*, 5 Abb. N. S. 221. But where it is necessary for such defendants to interpose separate answers, they should be allowed the costs of their several answers, in addition to one general bill of costs. *Walker v. Russell*, 16 How. 91; S. C., 7 Abb. 452 n; *Hall v. Lindo*, 8 id. 341.

Where several defendants appear by attorneys who are partners, it is well settled that they are entitled, on recovery, to but one bill of costs. *Brockway v. Jewett*, 16 Barb. 590; *Crofts v. Rockefeller*, 6 How. 9; *Ten Broeck v. Paige*, 6 Hill, 267. And the rule is the same where one of their attorneys is clerk to the other (*Perry v. Livingston*, 6 How. 404); or where they sever their defenses, and collusively appear by different attorneys for the mere purpose of increasing costs. *Slater Bank v. Sturdy*, 15 Abb. 75.

But where separate defenses are made by several defendants, in good faith, and they appear by separate attorneys, each is entitled, on a recovery in his favor, to a distinct bill of costs. *Castellanos v. Beauville*, 2 Sandf. 670; *Collomb v. Caldwell*, 5 How. 336; S. C., 1 Code R. N. S. 41; *Bridgeport Fire and Marine Ins. Co. v. Wilson*, 20 How. 511; S. C., 12 Abb. 209; 7 Bosw. 699. And a separate defense, made by a separate demurrer, must be regarded as coming within this rule. *Wilbur v. Wiltsey*, 13 How. 506.

If the defendants first appear by different attorneys, but, before judgment, unite and employ the same attorney, they are entitled to but one bill of costs from the time that they ceased to employ separate attorneys. *Castellanos v. Beauville*, 2 Sandf. 670; S. C., 3 Code R. 204.

When two actions are heard together, only one trial fee is chargeable; but, until the trial, the costs must necessarily be separate. *Hildebrant v. Crawford*, 6 Lans. 502.

d. Costs to plaintiff. Where the plaintiff recovers but one judgment, he is entitled to recover but one bill of costs, however numerous the defendants, or the defenses or issues may be; and this is so, although the defendants appear by different attorneys. *Buell v. Guy*, 13 How. 31; *Latham v. Bliss*, id. 416; S. C., 6 Duer, 661; *Phipps v. Van Cott*, 15 How. 110; *Hall v. Lindo*,

 Default of one defendant — Equity suits, or for special relief.

8 Abb. 341. *Contra, Comstock v. Halleck*, 4 Sandf. 671; overruled in *Buell v. Gay*, 13 How. 31.

e. Default of one defendant. Where one of several defendants, jointly liable, fails to make answer to the complaint, and the others defend the action, the defendant who has suffered a default is held jointly liable with them for all the costs recovered by the plaintiff. *Catlin v. Billings*, 13 How. 511; S. C., 4 Abb. 248; *Warner v. Ford*, 17 How. 54.

Section 7. Equity suits, or for special relief.

a. In general, or discretionary. In actions for relief, other than the mere recovery of money, or the possession of real or personal property, costs may be allowed or not in the discretion of the court. Code, § 306, subd. 1. Or, if the action is tried before a referee, the question of costs is in his discretion. *Pratt v. Stiles*, 9 Abb. 150; S. C., 17 How. 211; *Ludington v. Taft*, 10 Barb. 447; *Graves v. Blanchard*, 4 How. 300; S. C., 3 Code R. 25; *Taylor v. Root*, 48 N. Y. (3 Sick.) 687.

The class of actions in which the question of costs is thus left in the discretion of the court embraces all those of an equitable nature; the words, "other actions," contained in section 306, being construed as referring to other causes of action than those enumerated in section 304, which section embraces all but equity causes of action, as formerly understood. *Hinds v. Myers*, 4 How. 356; S. C., 3 Code R. 48; *Gallagher v. Egan*, 2 Sandf. 742. See *Riper v. Poppenhausen*, 43 N. Y. (4 Hand) 68.

The following cases will serve to illustrate the nature of the actions in which costs are clearly in the discretion of the court: An action for the foreclosure of a mortgage (*O'Hara v. Brophy*, 24 How. 379; *Bartow v. Cleveland*, 7 Abb. 339; S. C., 16 How. 364; *Pratt v. Ramsdell*, 7 Abb. 340, *n.*; S. C., 16 How. 59); an injunction suit (*Staiger v. Schultz*, 3 Abb. N. S. 377; S. C., 3 Keyes, 614; 3 Trans. App. 4); or, to set aside an assignment for the benefit of creditors (*Webb v. Daggett*, 2 Barb. 10); and so in cases where the question is as to the granting or withholding of letters testamentary upon a will (3 R. S. [5th ed.] 909, § 6; *Schenck v. Dart*, 22 N. Y. [8 Smith] 420; *McGregor v. Buell*, 33 How. 450; S. C., 1 Keyes, 153; reversing S. C., 17 Abb. 31); or, where an action is commenced by the personal representatives of a deceased judgment-creditor, to revive the judgment and obtain execution. *Ireland v. Litchfield*, 22 How. 178; S. C., 8 Bosw. 634.

Rules for allowing or refusing.

It has also been decided that costs are in the discretion of the court in all actions in which more than one species of relief is demanded; as, for example, where money, and also the recovery of specific property, are demanded in one action. *Cahoon v. The Bank of Utica*, 7 N. Y. (3 Seld.) 486. See Till. & Shear. Pr. 595.

Though the subject of costs, in the class of cases mentioned, as a general rule, rests in the discretion of the court, yet this discretion is to be exercised in accordance with certain well-established rules, and with a regard to the equities of each particular case. *Eastburn v. Kirk*, 2 Johns. Ch. 317; *Thrall v. Chittenden*, 31 Vt. 183.

b. Rules for allowing or refusing. A general rule observed by the court is, that the party prevailing in the action is *prima facie* entitled to costs. *Van Couver v. Bliss*, 11 Ves. 458; *Hampson v. Brandwood*, 1 Madd. 381, 394; *Thrall v. Chittenden*, 31 Vt. 183; *Saunders v. Frost*, 5 Pick. (Mass.) 260. And where the conduct of a party has been clearly wrongful or negligent, the rule will be strictly applied against him. *Spencer v. Spencer*, 11 Paige, 299. See *Rundle v. Allison*, 34 N. Y. (7 Tiff.) 180. Under this rule it is incumbent upon the unsuccessful party, in every case, to show special reasons why he should not pay costs. *Van Couver v. Bliss*, 11 Ves. 458.

In this class of actions costs will not be allowed to either party where both are in fault (*Saunders v. Frost*, 5 Pick. [Mass.] 260, 274; *Beacham v. Eckford*, 2 Sandf. Ch. 116; *Scott v. Thorp*, 4 Edw. 1; *Johnson v. Taber*, 10 N. Y. [6 Seld.] 319); and the same rule is observed where the court refuses protection to a plaintiff against a wrongful act of the defendant, on the ground that the plaintiff is defrauding the public in the matters concerning which the action is brought (*Fetridge v. Wells*, 4 Abb. 144; S. C., 13 How. 385); and so where both parties have acted foolishly, or have been equally imprudent, costs are refused. *Hitchcock v. Giddings*, 4 Price, 135.

On the same principle, no costs are allowed to either party where each makes an unfounded claim against the other (*Spencer v. Spencer*, 11 Paige, 299; *Caldwell v. Lieber*, 7 id. 483; *Brown v. Rickets*, 4 Johns. Ch. 303; *Brinckerhoof v. Lansing*, id. 65; *Righter v. Stall*, 3 Sandf. Ch. 608; *Ten Eyck v. Holmes*, 3 id. 428. See *Johnson v. Taber*, 10 N. Y. [6 Seld.] 319); nor where the party, otherwise entitled to costs, sets up claims to

Rules for allowing or refusing.

which he is not entitled. *Powell v. Murray*, 10 Paige, 256. But if, in such case, the matter in controversy is a mere money claim, the party establishing his right to a substantial payment from the other should be allowed his costs, deducting such as were plainly incurred in resisting his unfounded claims. *Hunn v. Norton*, 1 Hopk. 344.

In cases where the question raised between the parties is a fair one, and of such a difficult nature as to justify them in submitting their controversy to the court, it is a uniform rule to leave each party to pay his own costs (*Pattison v. Hull*, 9 Cow. 747; *White v. Foljambe*, 11 Ves. 337; *Dommelt v. Bedford*, 3 id. 149; *Staines v. Morris*, 1 Ves. & B. 8; *Thorpe v. Freer*, 4 Madd. 466); and especially is this the case where the unsuccessful party has been misled and encouraged by the *dicta* of a succession of judges, or by an erroneous decision. *Perry v. Whitehead*, 6 Ves. 544.

When two or more actions are brought, where one would have been sufficient, the plaintiff will be allowed costs in one action only, though he succeed in all (*Wilde v. Jenkins*, 4 Paige, 481, 500. See *Wendell v. Wendell*, 3 Paige, 509); but no costs will be allowed to a successful plaintiff in an action, where the relief sought could have been as well attained simply by an application on petition or affidavit (*De La Vergne v. Evertson*, 1 Paige, 181); and so costs were refused, where the matter in suit had previously been submitted to arbitration, and an award made which varied but little from the judgment of the court, although the award had not been pleaded as a bar. *Freeland v. Mannahan*, Hopk. 276. No costs will be awarded against a defendant in an action for special relief, who is indifferent between the real contending parties, and who shows himself ready to make payment to whomsoever is entitled to it, and who has created no costs by his own act or defense. *Eagleson v. Clark*, 2 Abb. 324; S. C., 2 E. D. Smith, 644.

Where an objection might be taken by demurrer, and demurrer is delayed until the trial on the merits, the additional costs accruing from the delay will not be allowed to the party raising the demurrer. *Shaw v. Coster*, 8 Paige, 339; *Murray v. Graham*, 6 id. 622; *Hollingsworth v. Shakeshaft*, 14 Beav. 492; *Anonymous*, 3 Madd. 62 n. See *Sanders v. Benson*, 4 Beav. 350. And where the trial is postponed for want of necessary parties to the action, if the defect of such parties was not set up

Costs in creditor's action.

by demurrer or answer, no costs are allowed on the postponement. *Court v. Jeffery*, 1 Sim. & Stu. 105; *Mitchell v. Bailey*, 3 Madd. 61. See *Shaver v. Brainard*, 29 Barb. 25. Where a transaction is of such a suspicious nature as to reasonably call for an investigation, the party through whose fault it has assumed this suspicious character ought not to be allowed costs, even though the transaction is sustained. *Fyler v. Fyler*, 3 Beav. 550; *De Montmorency v. Devereaux*, 7 Clark & Fin. 188; S. C., 2 Dr. & Wal. 410.

The rule, that the party who fails in the action can never receive costs (*Thorpe v. Freer*, 4 Mad. 466), admits of occasional exceptions. Thus, in a case where relief is granted against a hard bargain, as unconscionable, though not fraudulent, it is usually granted only upon payment of costs. *Bowes v. Heaps*, 3 Ves. & B. 117; *Gowland v. De Faria*, 17 Ves. 20; *Evans v. Peacock*, 16 id. 512; *Twisleton v. Griffith*, 1 P. Wms. 310. In *Lawley v. Hooper*, 3 Atk. 278, which, however, was a case of this kind, no costs were allowed; and in another case of a similar nature, costs were awarded to the plaintiff. *Barnardiston v. Lingood*, 2 Atk. 133.

The successful party has also sometimes been charged with costs, when the proceedings of the opposite party have been induced by the statements of the former, and those statements have been erroneous. *Fielder v. Higginson*, 3 Ves. & B. 142. See *Fenton v. Browne*, 14 Ves. 144.

Where a defendant, who is ready and willing to do justice, without suit being brought, is made a party without necessity, he should be allowed costs. *Stafford v. Mott*, 3 Paige, 100; *Bennett v. Atkins*, 1 Y. u. & C. Exch. 247; *Millington v. Fox*, 3 Myl. & Cr. 338.

c. Costs in creditor's action. In a creditor's action, if the object entirely fails, the plaintiff will be charged with costs. *Raymond v. Redfield*, 2 Edw. Ch. 196. And where a mere "fishing bill," not founded upon any specific allegation, or even upon any knowledge or belief that the defendant had any property, is brought and dismissed, the defendant's costs will not be set off against the judgment. *Evans v. Vance*, 2 Barb. 598.

No costs should be allowed to a plaintiff, in an action of this nature, even when successful, if the purposes for which the action was brought could as well be effected by a resort to the ordinary proceedings supplementary to execution.

On demurrer — Divorce — Dower — Fraud.

d. On demurrer. Unless there is something very special to take the case out of the general rule, costs should always be allowed to the successful party on a demurrer. *Utica Cotton Manufacturing Co. v. The Supervisors of Oneida*, 1 Barb. Ch. 432; *Gregory v. Reeve*, 5 Johns. Ch. 232.

e. Divorce. Where the judgment in a divorce suit is in favor of the wife, she should be allowed her costs. *Germond v. Germond*, 1 Paige, 83; *Graves v. Graves*, 2 id. 62. But, where the judgment is in favor of the husband, no costs will be allowed him, even in an action for divorce or adultery, if the wife has no separate property. *De Rose v. De Rose*, 1 Hopk. 100.

Upon a recovery of judgment by the wife, the allowance to her for costs and expenses of the suit is not confined to the mere taxable costs; and the husband should be allowed only for the balance of his advances, after deducting therefrom the necessary expenditures of the wife for counsel fees, etc., which are not ordinarily included in the taxed bill of costs. *Kendall v. Kendall*, 1 Barb. Ch. 610. See *Griffin v. Griffin*, 47 N. Y. (2 Sick.) 134. Where no answer is put in, the defendant will not be allowed to recover costs, notwithstanding the plaintiff fails to prove his case on a subsequent reference of the cause. *Perry v. Perry*, 2 Barb. Ch. 285.

f. Dower. If, in an action for dower, the plaintiff succeeds, she is entitled to costs, provided she has demanded her dower of the defendant before suit, and has been refused it. *Worgan v. Ryder*, 1 Ves. & B. 20. But, if the demand has not been made, the rule is otherwise. *Russell v. Austin*, 1 Paige, 192; *Hale v. James*, 6 Johns. Ch. 258; *Hazen v. Thurber*, 4 id. 604; Code, § 307. If there has been no vexation or undue hindrance on the part of the defendant to her claim, no costs will be allowed to the plaintiff in an action of this kind. *Hale v. James*, 6 Johns. Ch. 258.

Where a widow is a party defendant, she should have her dower assigned to her, without costs against her. *Hawley v. Bradford*, 9 Paige, 200; *Church v. Church*, 3 Sandf. Ch. 434.

g. Fraud. It is the rule to charge an unsuccessful party to an action, with costs, where such party has acted fraudulently as regards the subject of the suit (*Prentice v. Achorn*, 2 Paige, 30; *Bushnell v. Harford*, 4 Johns. Ch. 301); but he is not so chargeable with costs, where the fraud with which he is charged

Interpleader.

is not actual, but merely constructive. *Murray v. Ballou*, 1 Johns. Ch. 566.

Where a successful party in an action charges the opposite party with fraud, and such charge proves to be unfounded, costs will be denied him (*Cullingworth v. Loyd*, 3 Beav. 385. See *Brinckethoff v. Lansing*, 4 Johns. Ch. 79; *Ray v. Van Hook*, 9 How. 427); or, if even allowed his general costs, he will be required to pay so much costs as were incurred by the opposite party in disproving the unfounded charges of fraud. *Wright v. Howard*, 1 Sim. & Stu. 190, 205.

But, where the complaint contains charges of fraud, which are neither supported nor repelled by evidence on the trial, the above rule has no application. *Staniland v. Willott*, 3 Mac N. & G. 664; 12 Eng. Law & Eq. 42.

Unfounded charges of fraud afford sufficient ground upon which to charge the unsuccessful party with costs (*Langley v. Fisher*, 9 Beav. 90; *Scott v. Dunbar*, 1 Moll. 442; *Shedden v. Patrick*, 1 Macq. 535), unless the conduct of the opposite party was suspicious; or he has been put to no trouble or expense in disproving them (*Staniland v. Willott*, 3 Mac N. & G. 664; *Fyler v. Fyler*, 3 Beav. 550; *De Montmorency v. Devereux*, 7 Clark & Fin. 188; S. C., 2 Dr. & Wal. 410); or, unless in a case where the pleader has made such charges in good faith, and without adequate means of knowing their falsity. *Wade v. Dick*, 1 Ired. Eq. 313.

h. Interpleader. Where an action of interpleader is properly brought, the plaintiff is entitled to have his costs allowed him out of the fund in court, almost as a matter of course. *Atkinson v. Manks*, 1 Cow. 691; *Thomson v. Ebbets*, 1 Hopk. 272; *Canfield v. Sterling*, id. 224; *Aymer v. Gault*, 2 Paige, 284. And not only so, but he is also entitled to costs incurred by him, in an action at law brought against him by the defendants, in relation to the same subject-matter in dispute. *Miller v. De Peyster*, 1 Abb. 234; S. C., 4 Duer, 203; *Richards v. Salter*, 6 Johns. Ch. 445. Vol. 1, p. 176.

Justice between the other parties, as regards costs, is finally done by compelling the party whose claim is adjudged groundless, to pay those costs to the rightful claimant of the fund. *Thomson v. Ebbets*, 1 Hopk. 272. See *Badeau v. Rogers*, 2 Paige, 209. The fact, that the party who was in the wrong is not

Mortgage cases — Partition.

within the jurisdiction of the court, does not change the rule. *Canfield v. Sterling*, 1 Hopk. 224.

Where an action of interpleader is unnecessarily brought, the plaintiff will not be allowed his costs. *Bedell v. Hoffman*, 2 Paige, 199; *Badeau v. Rogers*, id. 209. Thus, where an action is brought, the object of which could be wholly attained by application under section 122 of the Code, no costs will be allowed. See *Bedeau v. Rogers*, 2 Paige, 209.

i. *Mortgage cases.* In mortgage cases it is a general rule to allow the mortgagee his costs, whether as plaintiff in an action of foreclosure, or as a defendant in an action to redeem (*Benedict v. Gilman*, 4 Paige, 58; *Bartle v. Wilkin*, 8 Sim. 238; *Detillin v. Gale*, 7 Ves. 583; *Wetherell v. Collins*, 3 Madd. 255); and this, without reference to his success in the suit (*Slee v. Manhattan Co.*, 1 Paige, 48; *Vroom v. Ditmas*, 4 id. 526, 535); and notwithstanding he claims more than is due. *Loftus v. Swift*, 2 Sch. & Lef. 657. The same rule as to costs extends to all persons claiming under the mortgagee, and who are necessarily made parties to such action. *Wetherell v. Collins*, 3 Madd. 255; *Coles v. Forrest*, 10 Beav. 552.

This rule, as to costs, as above laid down, is, however, subject to exceptions, for if the mortgagee has been guilty of any misconduct with reference to the action, or the subject-matter of it, costs will be denied him (*Detillin v. Gale*, 7 Ves. 583; *Vroom v. Ditmas*, 4 Paige, 526; *Van Buren v. Olmstead*, 5 id. 9); and so, if the mortgage has been actually satisfied before the action to redeem is commenced (*Calkins v. Isbell*, 20 N. Y. [6 Smith] 147); or, if a tender of the amount due has been made and refused. *Pratt v. Stiles*, 9 Abb. 150; S. C., 17 How. 211; *Shuttleworth v. Louther*, cited, 7 Ves. 586. See *Roberts v. Williams*, 4 Hare, 129. A tender, to be effective, however, must be of the whole sum due, and of the costs, if any have been incurred; and if a tender is refused, and it afterward appears that the sum actually due exceeds the amount tendered, the defendant will not be exempted from costs. *Taylor v. Hall*, 2 Gwill. 611 n.; *Worrall v. Nicholls*, 3 id. 1302; 2 Dan. Ch. Pr. 1396.

In a case where the mortgagee sets up an unconscientious defense, he is not only refused costs, but he must pay them to the opposite party. *Slee v. Manhattan Co.*, 1 Paige, 48.

j. *Partition.* In cases of actual partition of lands, the aggregate amount of costs of the several parties is to be apportioned

 Quieting title — Specific performance.

and charged upon the parties to the proceedings, according to their respective rights and interests in the premises; and the parties whose taxed bills exceed their ratable proportions of the whole costs are entitled to executions against those whose taxed bills are less. *Phelps v. Green*, 3 Johns. Ch. 302; *Tibbits v. Tibbits*, 7 Paige, 204; *Matter of Hemiup*, 3 id. 305.

Where the plaintiff in an action for partition brings in unnecessary parties as defendants, he will be personally charged with the additional costs (*Hamersley v. Hamersley*, 7 N. Y. Leg. Obs. 127); but the rule is otherwise, if such unnecessary parties are brought in at the request of the other defendants. *Ib.*

Where additional costs are occasioned by the setting up of an unfounded claim, they must also be borne exclusively by the party in fault. *Crandall v. Hoysradt*, 1 Sandf. Ch. 40.

k. Quieting title. Upon a judgment for the plaintiff in an action brought to quiet title, where the plaintiff had made improvements on land which he believed to be his, but the legal title to which was in the defendant, and the defendant acquiesced in such improvements, costs are allowed to neither party. *De Remer v. Cantillon*, 4 Johns. Ch. 85. See *Stiles v. Cowper*, 3 Atk. 692; *Jackson v. Cator*, 5 Ves. 685.

l. Specific performance. In an action for the specific performance of a contract, the successful plaintiff (vendee) is not entitled to costs, unless he has made a demand of performance and has tendered the purchase-money before bringing the action (*Bruce v. Tilson*, 25 N. Y. [11 Smith] 194; *Dustin v. Newcomer*, 8 Ohio, 49), and the purchase-money must be brought into court. *Galloway v. Barr*, 12 Ohio, 354.

These conditions being performed, the vendee, if successful in the action, is entitled to costs. *Hart v. Brand*, 1 A. K. Marsh. 162. See *Dyer v. Potter*, 2 Johns. Ch. 152.

A vendor who has failed to deliver an abstract of his title, or who has not cleared off the lien of a judgment, will not be allowed his costs in an action for a specific performance, although he succeed. *Scott v. Thorp*, 4 Edw. Ch. 1; *Wynn v. Morgan*, 7 Ves. 202; *Winne v. Reynolds*, 6 Paige, 407. And so if the abstract delivered be insufficient. *Wilson v. Clapham*, 1 Jac. & W. 36. And, in general, whenever there is a fair objection made to a title by a purchaser, although he fails in the objection, no costs will be allowed to the vendor. *Aislabie v. Rice*, 3 Mad. 256; *Thorpe v. Freer*, 4 id. 466. But if a purchaser makes

Specific performance — Trustees.

frivolous objections to a title (Ib.) ; or persists in objecting, after being notified of a prior decision in a different cause in favor of the same title against a similar objection, he will be charged with costs, on a judgment for a specific performance, in favor of the vendor. *Biscoe v. Wilks*, 3 Meriv. 456.

The heirs of a party in an action for the specific performance of an agreement, where it appears that there was no improper behavior or unjustifiable defense, should not be charged with costs. *Dyer v. Potter*, 2 Johns. Ch. 152. And where infant heirs, against whom a specific performance is sought, have derived no property from the vendor, except that which they are required to convey, and for which the purchase-money has been paid to the deceased vendor, the purchaser will be required to pay their costs. *Sutphen v. Fowler*, 9 Paige, 280.

m. Trustees. It is a general principle, that a trustee has a right to the protection of the court in the execution of his trust ; and he is therefore entitled to his costs, whether as plaintiff or defendant in an action, unless the act required to be done involves him in no responsibility, or his motive is obviously vexatious. *Curteis v. Candler*, 6 Madd. 123 ; *Poole v. Pass*, 1 Beav. 600 ; *Hosack v. Rogers*, 9 Paige, 461.

The general rule laid down is, that they will be allowed costs in settling their accounts so far as they are not in fault, but must pay costs as to such inquiries in the action as are made necessary by their breach of trust. *Ray v. Van Hook*, 9 How. 427 ; *Waring v. Crane*, 2 Paige, 79 ; *Duffy v. Duncan*, 32 Barb. 587 ; S. C. affirmed, 35 N. Y. (8 Tiff.) 187.

Thus, a trustee will be charged with all the costs of a litigation arising out of his gross negligence in the management of the accounts of the trust estate, or from his misapplication of the trust funds. *Spencer v. Spencer*, 11 Paige, 299. And if a trustee neglects his duty by omitting to invest money placed in his hands, he will be charged with the costs of the proceedings for its investment. *Powell v. Murray*, 10 Paige, 256.

A trustee, seeking the direction of the court, in good faith, as to any matter involving him in responsibility in the execution of his trust, is always entitled to his costs. *Curteis v. Candler*, 6 Madd. 123. Thus, an executor, who is indebted to the estate, has a right to ask the aid and protection of the court in paying over the money due by him, and his costs will be allowed out of the fund. *Decker v. Miller*, 2 Paige, 149. But, where a trustee has

Trustees — Wills.

a private interest of his own, separate and independent from the trust, and obliges the *cestui que trust* to come into court, merely to have the point relating to his own private interest determined at the expense of the trust, such behavior will be regarded as vexatious on the part of the trustee, and he will be charged with the whole costs of the suit. *Henley v. Philips*, 2 Atk. 48; *Gardner v. Gardner*, 6 Paige, 455; *Hunn v. Norton*, 1 Hopk. 344.

There are, also, other cases of misconduct which will render a trustee liable to the costs of the suit, as, where he persists in proceeding with the suit, after it has become unnecessary (*Campbell v. Campbell*, 2 M. & C. 25); or if, being indebted to the trust estate, he resists the account and claims a balance (*Eglin v. Sanderson*, 3 Giff. 434); or if, by chicanery, he keeps the *cestui que trust* from a true knowledge of the accounts, or even if he has kept the accounts in a very confused manner. *Avery v. Osborne*, Barnard, 349; *Norbury v. Calbeck*, 2 Moll. 461. And so if a trustee, by his answer, sets up objections to his performance of his trust, which he fails to substantiate, he will be charged with the costs. *Willis v. Hiscox*, 4 M. & C. 197. See *Low v. Carter*, 1 Beav. 426.

It is a general rule to allow a trustee his costs, however, in all cases where he has not acted in bad faith or from interested motives. *Noble v. Meymott*, 14 Beav. 471.

n. Wills. Where, on account of the ambiguous terms of a will, it becomes necessary to take the directions of the court as to the construction of its provisions, the costs of the necessary parties to the litigation should be paid out of the estate. *Rogers v. Ross*, 4 Johns. Ch. 608; *King v. Strong*, 9 Paige, 94; *Sawyer v. Baldwin*, 20 Pick. 378; *Miller v. Rowan*, 5 Clark & Fin. 99; *Pearson v. Pearson*, 1 Sch. & Lef. 12; *Commissioners of Charities v. Cotter*, 1 Dr. & War. 498; *Irving v. De Kay*, 9 Paige, 521; *Barrington v. Tristram*, 6 Ves. 349; *Brown v. Brown*, 41 N. Y. (2 Hand) 507. See *Smith v. Smith*, 4 Paige, 271. This rule is especially applicable where an infant, an idiot or a lunatic is made a party to such an action. *King v. Strong*, 9 Paige, 94; *Wood v. Vandenburg*, 6 id. 277.

The above rule, however, is not inflexible, and, where certain specified property is left to particular parties and the residue to others, the costs should be borne ratably by all the parties in proportion to the value of their several interests (*Mitchell v. Blain*, 5 Paige, 588); or, such costs may properly be charged to

Municipal corporations — Rate and amount of costs — Before notice of trial.

any fund created out of the estate for a purpose which is likely to fail, and which is tied up, subject to a contingency. *King v. Strong*, 9 Paige, 94. See *Alsop v. Bell*, 24 Beav. 451; *Morrell v. Fisher*, 4 De G. & S. 422; *Wilson v. Heaton*, 11 Beav. 492.

In a suit between claimants under a will, and other claimants under an inconsistent deed, executed by the testator, costs are governed by the ordinary rule in adverse suits, and cannot be charged to the estate. *Irwin v. Rogers*, 12 Irish Eq. R. 159.

o. Municipal corporations. No costs or disbursements can be recovered or inserted in any judgment against a municipal corporation, unless the claim upon which such judgment is founded was presented for payment to the chief fiscal officer of such corporation before the commencement of an action thereon. Laws of 1859, p. 576, ch. 262, § 2.

It seems that the provisions of this act have no application to actions for unliquidated damages arising *ex delicto*; as, for example, to a claim for damages for property destroyed by a mob. *McClure v. Board of Supervisors of Niagara County*, 50 Barb. 594; S. C., 33 How. 202; 4 Abb. N. S. 202; 4 Trans. App. 275. See *Hart v. The City of Brooklyn*, 36 Barb. 226, where it is held that the statute applies as well to claims for damages on account of the negligence or misconduct of the city authorities, as to demands upon contract.

Section 8. Rate and amount of costs.

a. In general. In cases where costs are allowed to either party, the amount so allowed is fixed by the provisions of the Code, section 307; and where the fee-bill is thus contained in the statute, the court can exercise no discretionary power as to the amount of the items specified, nor has it authority to add items for services not specified by the statute. *Downing v. Marshall*, 37 N. Y. (10 Tiff.) 380.

b. Before notice of trial. The plaintiff's costs for all proceedings before notice of trial, in actions where judgment for failure to answer can be taken without application to the court, and in which only one defendant is served with process, are \$15; but in like actions, where judgment can only be taken on application to the court, his costs are \$25. Code, § 307, subd. 1.

As to which of these amounts the plaintiff is entitled to receive depends on whether the nature of the action is such that judgment, in case of failure to answer, might be had without appli-

Before notice of trial.

cation to the court, and not on the question whether the pleadings render such application necessary. *Van Valkenburg v. Van Schaick*, 8 How. 271; *Pardee v. Schenck*, 11 id. 500; overruling *Lawrence v. Davis*, 7 id. 354. See *People v. Van Dusen*, 3 id. 385; S. C., 2 Code R. 7; *Candee v. Ogilvie*, 5 Duer, 658.

Where more than one defendant is served with process, the plaintiff is entitled to the sum of \$2 for each additional defendant so served, not exceeding ten; and for each necessary defendant in excess of that number, served with process, the plaintiff is entitled to \$1. Code, § 307, subd. 1.

The allowance for additional defendants, to which the plaintiff is entitled under this subdivision, is limited to defendants *necessarily* and properly joined, and will not be made for parties whom he has no right to bring before the court. *Case v. Price*, 17 How. 348; S. C., 9 Abb. 111. The objection that some of the parties named as defendants are not necessary may be taken at any time, even on the adjustment of costs. *Case v. Price*, 17 How. 348; 9 Abb. 111.

If the plaintiff's claim is just, and such as would entitle him to costs on judgment, his right to the costs specified is fixed by the commencement of the action, and must be included in any tender or offer of judgment made by the defendant. *Rockefeller v. Weidervax*, 3 How. 382; S. C., 2 Code R. 3; *Keese v. Wyman*, 8 How. 88; *Burnett v. Westfall*, 15 id. 430; *People v. Banker*, 8 id. 258; nor will a settlement in fraud of such right avail to defeat it. *Bogardus v. Richtmeyer*, 8 Abb. 179.

The defendant's costs in an action before notice of trial are \$10 (Code, § 307, subd. 2); and the right to this allowance accrues to the defendant immediately on action brought, without regard to his having or not having retained an attorney; and the plaintiff will not be allowed to discontinue, without payment to him of that amount. *Foster v. Bowen*, 1 Code R. N. S. 236. A defendant, however, who has made an offer, cannot tax this fee, even though the plaintiff obtain a less favorable judgment. *Keese v. Wyman*, 8 How. 88; *Burnett v. Westfall*, 15 id. 430.

In case of the dismissal of a complaint, before notice of trial, for want of prosecution, the defendant is entitled only to costs of proceedings before notice of trial, with costs of the motion to dismiss. *Tillspaugh v. Dick*, 8 How. 33.

After notice and before trial.

c. After notice and before trial. For all proceedings after notice of and before trial, the plaintiff is allowed \$15 (Code, § 307, subd. 1), and the defendant is likewise allowed the same amount. Code, § 307, subd. 2.

Notwithstanding a cause has been noticed for trial more than once, or even if it is tried more than once, this amount of costs can only be once charged (*Perry v. Livingston*, 6 How. 404; *Jackson v. McBurney*, id. 408; *Sipperly v. Warner*, 9 id. 332; *Jackett v. Judd*, 18 id. 385. See *Considerant v. Brisbane*, 1 Bosw. 644; S. C., 7 Abb. 345, *n*); and the right to the allowance does not accrue until notice has been *actually* served, notwithstanding other proceedings may have been taken. *Morrison v. Ide*, 4 How. 304; S. C., 3 Code R. 27; *Tillspaugh v. Dick*, 8 How. 33.

If, before the service of notice of an order allowing a party to discontinue on payment of costs, the adverse party has noticed the cause for trial, he is entitled, as a part of the costs on the discontinuance, to this fee. *Hall v. Lindo*, 8 Abb. 341.

The fee is not taxable as against a defendant who has suffered a default, and against whom the case has not been noticed. *Sluyter v. Smith*, 2 Bosw. 673. Neither can it be taxed in an action in which no issue is raised, even though a notice of trial is served, for, where there is no issue to be tried, no notice of trial is necessary. *Pardee v. Schenck*, 11 How. 500.

It is, however, taxable, as part of the costs of the hearing or of the term, when conditionally imposed upon either of the parties. *Buckingham v. Minor*, 18 How. 287; *Dewey v. Stuart*, 6 id. 465; *Mitchell v. Westervelt*, id. 265; affirmed, id. 311; *Shanks v. Rae*, 19 How. 540.

It is not taxable on a motion for judgment on a frivolous demurrer (*Rochester City Bank v. Rapelje*, 12 How. 26; *Butchers and Drovers' Bank of Providence v. Jacobson*, 22 id. 470), for the hearing of such a motion is not a trial. *Ib*.

In addition to this item of \$15, either party is also allowed for attending upon and taking the deposition of a witness conditionally, or attending to perpetuate his testimony, the fee of \$10; and the same amount for drawing interrogatories to annex to a commission for the taking of testimony, or for attending the examination of a party before trial. Code, § 307, subd. 3.

For the appointment of a guardian of an infant defendant, the plaintiff is allowed \$10; but no more than that sum will be

Trial fees.

allowed for the appointment of guardians in any one action. *Ib.* And to the plaintiff is also allowed the sum of \$10, for procuring an order of injunction. *Ib.*

d. Trial fees. For the trial of an issue of law, either party is allowed \$20, and for every trial of an issue of fact, \$30. If the trial necessarily occupies more than two days, the sum of \$10 additional is allowed. Code, § 307, subd. 4.

Under this provision of the Code, a trial fee will be allowed to the successful party, in every case in which an issue has been joined and disposed of, by being regularly brought to trial, although no testimony has been taken and no verdict rendered. Thus, for the purposes of costs, it is held to be equivalent to a trial where the plaintiff, in an action at issue, fails to appear when the cause is called upon the calendar, and an order is taken that the cause be dismissed. *Dodd v. Curry*, 4 How. 123; S. C., 2 Code R. 69. And the defendant in such case will be entitled to the fee. *Ib.* And so where the plaintiff is nonsuited on the trial (*Allaire v. Lee*, 4 Duer, 609; S. C., 1 Abb. 125); or where the complaint is dismissed as containing no cause of action. *Shannon v. Brower*, 2 Abb. 377.

Where questions of law, arising upon the trial or verdict, are reserved for further consideration, and subsequently disposed of at special term, the successful party is entitled to recover the fee prescribed for the trial of an issue of law (*Waterbury v. Westervelt*, 3 Sandf. 749; S. C., 1 Code R. N. S. 215), although the cause is not placed on the calendar, and is heard on the minutes of the clerk, without any case or bill of exceptions. *Ib.*

A trial fee cannot be taxed on a reference to take an account or to ascertain damages. *Tuaks v. Schmidt*, 25 How. 340. Nor against a defendant who has suffered judgment by default, though the cause may have been tried as to others. *Sluyter v. Smith*, 2 Bosw. 673. And this is so even where the summons, being served by publication, the plaintiff is required to prove his case (*Chapman v. Lemon*, 11 How. 235); or where the whole claim of the plaintiff is admitted by the defendant, who sets up a counter-claim which the plaintiff does not controvert. *Pardee v. Schenck*, 11 How. 500.

Nor is a trial fee taxable upon a judgment, which is obtained by motion, as upon a dismissal of the complaint for want of prosecution (*Tillspaugh v. Dick*, 8 How. 33); or where judgment is rendered on the plaintiff's motion, for the frivolousness of the

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defendant's answer or demurrer. *Rochester City Bank v. Rap-
elje*, 12 How. 26; *Marquisee v. Brigham*, id. 399; *Butchers
and Drovers' Bank of Providence v. Jacobson*, 22 id. 470; *Bell
v. Noah*, 24 id. 478; *Pardee v. Schenck*, 11 id. 500; *Chapman
v. Lemon*, 11 id. 236; *Roberts v. Clark*, 10 id. 451; *Gould v. Car-
penter*, 7 id. 97; *Bernhard v. Kapp*, 11 Abb. N. S. 342. But
the following cases hold a contrary doctrine: *Roberts v. Mor-
rison*, 7 How. 396; S. C., 11 N. Y. Leg. Obs. 60; *Lawrence v.
Davis*, 7 How. 354; *Pratt v. Allen*, 19 id. 450.

The fee prescribed by the Code, for every trial of an issue of
fact, should be allowed for every time the cause is tried; the
labor of counsel being equally great whether the jury agree or
not. *Hamilton v. Butler*, 30 How. 36; S. C., 19 Abb. 446; 4 Rob.
654. See *Ellsworth v. Gooding*, 8 How. 1; *Van Schaick v.
Winne*, id. 5; *Potsdam & Watertown R. R. Co. v. Jacobs*, 10
id. 453.

The discontinuance of the action by the plaintiff, after the
cause has been called and moved for trial by the defendant,
would clearly entitle the latter to charge a trial fee as part of his
costs; and so, where a defendant insists upon his defense until his
cause is called, and moved for trial by the other party, he can-
not then put an end to the action by payment, without being
liable to pay a trial fee, if the plaintiff insists upon it. *Jones v.
Case*, 38 How. 349. See, also, *Moffatt v. Ford*, 14 Barb. 577;
Pomeroy v. Hulin, 7 How. 161.

And where a juror is withdrawn by the plaintiff, in order that
he may amend his complaint, the defendant is entitled to a trial
fee, as well as his fee for services after notice of trial and before
trial. *Dewey v. Stewart*, 6 How. 465. See, also, *Mitchell v.
Westervelt*, id. 265. So, where an action to compel an accounting
has been commenced, it is proper where the matter was heard on
the special term calendar, and an accounting ordered that a fee
for the trial of an issue of law should be taxed. *Wiggins v.
Arkenburg*, 4 Sandf. 688.

The \$10 additional costs allowed to the successful party, where
the trial necessarily occupies more than two days, will be given
in cases in which more than two days are so occupied, including
the time spent in the preparation and submission of written
points or arguments, provided that method of submission has
been agreed upon. *Mygatt v. Willcox*, 35 How. 410.

Term fees.

e. Term fees. For every circuit or term, not exceeding five circuits, and five special and five general terms, at which the cause is necessarily on the calendar and is not tried, or is postponed by order of the court; and for every term not exceeding ten excluding the term at which the cause is argued in the court of appeals, the sum of \$10 is allowed to either party. Code, § 307, subd. 7.

The right to term fees does not accrue to a party, until the cause is actually at issue, even though the date of the issue be fixed by stipulation of parties (*Livingston v. The Vieille Montagne Zinc Mining Company*, 4 Duer, 681; S. C., 2 Abb. 255); and where there is no issue, of course no term fees can be charged at all (*Tillsbaugh v. Dick*, 8 How. 33; *Sluyter v. Smith*, 2 Bosw. 673), even, if the cause be put on the calendar. *Candee v. Ogilvie*, 5 Duer, 658; *Pardee v. Schenck*, 11 How. 500.

Neither can they be charged for a term subsequent to a settlement (*Latham v. Bliss*, 13 How. 416); or a discontinuance of the cause (*Drew v. Comstock*, 17 How. 469); nor if the cause be placed irregularly on the calendar (*Reformed Dutch Church v. Brown*, 24 How. 89); as, for example, while a stay of proceedings is in effect (*Shufelt v. Power*, 13 How. 89); or, before certain prescribed rules of the court have been complied with. *Reformed Dutch Church v. Brown*, 24 How. 89.

The law makes no provision for more than five term fees in any action; hence, an extra term fee, after the cause has been on the calendar for five terms, and after it has been once tried, although set down for another trial by the judge for the next term, cannot be allowed for such term. *Hamilton v. Butler*, 30 How. 36; S. C., 19 Abb. 446; 4 Rob. 654.

So, where a cause is placed on the calendar of one term of the court, and is transferred by order of the court to another contemporaneous term, no term fee is taxable for the former term (*Comstock v. Halleck*, 4 Sandf. 671), and where the cause is noticed for two different terms at the same time a term fee cannot be taxed for both, even though the fault lies with the unsuccessful party. *Wilson v. Allen*, 4 How. 54; S. C., 2 Code R. 26.

If the cause is put over the circuit, on payment of certain costs by the defendant, the plaintiff, on recovering a verdict, cannot be allowed a term fee for such term. *Trustees of Penn Yan v. Tuell*, 9 How. 400.

Nor will term fees be allowed where the cause has been re-

Term fees.

served by consent and not by order of the court (*Crawford v. Kelly*, 10 Bosw. 697); nor where the cause is referred on motion, without consent, at the circuit, and before it is reached on the calendar. *Perry v. Livingston*, 6 How. 404; *Sipperly v. Warner*, 9 id. 333.

The successful party in an action is not entitled to a term fee for any term at which the cause was postponed on his motion, or by consent at his request and for his benefit (*Hanna v. Dexter*, 15 Abb. 135; *Hinman v. Bergen*, 5 How. 245); nor for any term over which the cause is thrown, owing to his fault. *Purdy v. Morgan*, 2 How. 149; *Whipple v. Williams*, 4 id. 28; *Hendricks v. Bouck*, 2 Abb. 360; S. C., 4 E. D. Smith, 461. But if the cause is postponed by mutual consent, and for mutual convenience, the term fee should be allowed to the prevailing party. *Fisher v. Hunter*, 15 How. 156; *Sipperly v. Warner*, 9 id. 332. See *Benton v. Sheldon*, 1 Code R. 134.

A stay of proceedings is, in no proper sense, a postponement of the cause for the purposes of costs. *Shufelt v. Power*, 13 How. 89. Neither is the withdrawal of a cause from a term at which it is called, and its submission on written arguments to another judge, a postponement in the sense contemplated by the provisions of section 307 of the Code. *Hager v. Danforth*, 8 How. 448.

Where the plaintiff's attorney notified the defendant that the plaintiff had left the State, and that all further proceedings would be suspended in the action, and the defendant kept the cause on the calendar, it was held, that he was not entitled to tax subsequent term fees, as the cause was unnecessarily on the calendar. His proper course would have been to move for a discontinuance or a dismissal of the complaint. *Jennings v. Fay*, 1 Code R. N. S. 231.

And where stipulations to settle an action have been entered into, it is not proper to tax subsequent term fees. *Latham v. Bliss*, 13 How. 416; S. C., 6 Duer, 661.

So, where the cause is noticed only by the plaintiff, and he has the power to try, but fails to do so, he cannot recover the costs of the circuit. *Whipple v. Williams*, 4 How. 28. See *Linacre v. Lush*, 3 Wend. 305; *Titus v. Bullen*, 6 id. 562; *Purdy v. Morgan*, 2 How. 149; *Slocum v. Lansing*, 3 Denio, 259; *Koon v. Thurman*, 2 Hill, 357.

Although by the provisions of the Code, section 307, term fees

Term fees.

are allowed for only five terms, yet the parties may waive the statutory limit, by a stipulation that the costs of additional terms shall abide the event, and thus may agree to tax a term fee for more than five terms. *Emmons v. New York and Erie R. Co.*, 17 How. 490.

Term fees are not allowed, either for subsequent terms after a cause has been referred (*Anonymous*, 1 Duer, 651), or the number of times that a cause is noticed before a referee. *Anonymous*, 1 id. 596; S. C., 8 How. 82; overruling, *Benton v. Buggall*, 1 Code R. N. S. 229.

It may be observed, as a general rule, that a term fee is given for every term where the cause is *necessarily* on the calendar, and not tried; but when tried, then no term fee is given, but a trial fee in place of it. *Place v. Butternut's Woolen and Cotton Manufacturing Co.*, 28 How. 184; affirmed, id. 187 (n). And a cause is "*necessarily*" on the calendar when being ready for trial, it is regularly put there by the party noticing it. *Sipperly v. Warner*, 9 How. 332; *Perry v. Livingston*, 6 id. 404.

Where a cause has been set down for a particular day of the term, but is not reached on that or any following day of that term, the prevailing party is entitled to a term fee. *Ormsby v. Babcock*, 4 Duer, 680; S. C., 2 Abb. 253. So, the prevailing party is entitled to his term fees where he attends the circuit prepared for trial, and the cause, through no default of his, is not tried. *Fisher v. Hunter*, 15 How. 156; *Shufelt v. Power*, 13 id. 89; *Minturn v. Main*, 2 Sandf. 737. The right to a term fee does not attach, unless the circuit has actually commenced. Thus, where the cause was noticed for trial at the circuit by both parties and put upon the calendar by the clerk, and, on Saturday, previous to the commencement of the circuit on the following Monday, the plaintiff discontinued, — it was held, that the cause was not necessarily on the calendar, and that the defendant was not entitled to the circuit fee. *Drew v. Comstock*, 17 How. 469.

Term fees are allowed in the city court of Brooklyn, subject to the same restrictions as in the circuit of the supreme court. *Bird v. City of Brooklyn*, 2 Abb. N. S. 132.

Previous to the amendment of 1866, there was no limitation to the number of term fees in the court of appeals (*Adams v. Perkins*, 25 How. 368; *Hakes v. Peck*, 30 How. 104); but, by an amendment of the above year, a term fee of \$10 is allowed for

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every term, not exceeding ten, excluding the term at which the cause is argued in that court. Code, § 307, subd. 7.

The representative of a party to an action, who dies while an appeal is pending in the court of appeals, is entitled to continuous term fees after the death of such party, if the action and appeal are subsequently revived in his name. Thus, where the defendant died in February, and the action was revived in March following, the term fees in the court of appeals for the March and June terms were properly taxable, as one notice for the year in that court is sufficient. *Carpentier v. Willett*, 28 How. 376; S. C., 3 Rob. 700; S. C. affirmed, 31 N. Y. (4 Tiff.) 90.

When a new trial shall be had, either party being successful, will be entitled to \$25 for all proceedings after the granting of, and previous to the occurrence of, such new trial. Code, § 307, subd. 3.

Section 9. Double and treble costs. The question as to whether the provisions of the Revised Statutes allowing double (2 R. S. 617, § 24; id. 461, § 26) and treble costs (1 R. S. 324, § 6) in certain cases, have been repealed by the Code, has undergone considerable discussion; but the point has been finally settled that the right to recover such costs in the cases specified still exists. *Bortle v. Gilman*, 18 N. Y. (4 Smith) 260; S. C., 17 How. 1; *Stewart v. Metropolitan Board of Health*, 33 id. 3; S. C. affirmed, 34 id. 31; S. C., 3 Abb. N. S. 383; 50 Barb. 192; *Stoddard v. Clarke*, 9 Abb. N. S. 310. See, also, *Bradley v. Fay*, 18 How. 481; *People v. Colborne*, 20 id. 378.

The following decisions to the contrary have been overruled: *Hallenbeck v. Miller*, 4 How. 239; *Van Rensselaer v. Kidd*, 5 id. 242; *Nestle v. Jones*, 6 id. 172; *Thompson v. Stryker*, 6 Abb. 381; *Bagner v. Jones*, 1 Code R. N. S. 234; *Moore v. Westervelt*, 1 id. 131; S. C., 3 Sandf. 762.

The statute giving double costs is, however, applicable only to actions and proceedings at law, and not to suits in equity, and, consequently, can have no application to actions of purely equitable cognizance under the Code. *Taaks v. Schmidt*, 25 How. 340; *Cooper v. The Metropolitan Board of Health*, 33 id. 5; *Stewart v. The Metropolitan Board of Health*, id. 3; S. C. affirmed, 34 id. 31; S. C., 3 Abb. N. S. 383; 50 Barb. 192; *Davis v. Cooper*, 50 Barb. 376. And the party entitled to such costs must apply to the court for them, the clerk not being authorized to

To officers.

decide upon allowing or disallowing them on taxation. *Ib.* But see, contra, *Wheelock v. Hotchkiss*, 18 How. 468.

b. To officers. By double costs are meant the ordinary taxed costs and one-half the amount in addition, and they are allowed upon a judgment rendered for the defendant upon verdict, demurrer, nonsuit, discontinuance or otherwise, in the following actions :

1. In actions against public officers appointed under the authority of this State, or elected by the people ; or against any person specially appointed, according to law, to execute the duties of such officer ; for, or concerning any act done by such officer or person, by virtue of his office, or for or concerning the omission by such officer or person to do any act which it was his official duty to perform.

2. In actions against any other person, for doing any act by the commandment of such officers or persons, or in their aid or assistance, touching the duties of such office or appointment.

3. In actions against any person for taking any distress, making any sale, or doing any other act by authority of any statute of this State. 2 R. S. 617 (640), § 24.

It has also been held that, where a defendant, sued as a public officer, obtains judgment upon a report of referees, he is entitled to double costs under the provisions of the statute, the same as if judgment had been rendered upon a verdict. *Tillou v. Sparks*, 9 How. 465. See *Calkins v. Williams*, 5 How. 393 ; S. C., 1 Code R. N. S. 53 ; *Anonymous*, 19 Wend. 225.

But an action in the nature of a *quo warranto* is not one in which the defendant can recover double costs. *People v. Adams*, 9 Wend. 464. Neither are they allowed on any interlocutory proceeding, the costs of which are not part of the final costs. *Mack v. McCulloch*, 2 How. 127 ; *Saratoga Railroad Co. v. McCoy*, 7 id. 190 ; *Waring v. Acker*, 1 Hill, 673 ; *Rider v. Hubbell*, 4 Wend. 201.

A defendant who would otherwise be entitled to double costs, loses his right to them by joining in one answer with another defendant who is not within the provisions of the statute. *Bradley v. Fay*, 18 How. 481. And an interested party acting in his own behalf, and not solely in aid of the officer, is not one of the persons for whose benefit the statute was intended, and is not entitled to double costs. *Ib.* ; *Merrill v. Near*, 5 Wend. 237. It has been decided that justices of the peace (*Row v. Sherwood*, 6

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Johns. 109); constables (*Jones v. Gray*, 13 Wend. 280. See *Platt v. Sherry*, 7 Wend. 236; *Wales v. Hart*, 2 Cow. 426); surrogates (*Burhans v. Blanchard*, 1 Denio, 626) and school-tax collectors (*Reynolds v. Moore*, 9 Wend. 35), are included within the statute and entitled to the benefit of it.

c. How obtained. Double costs can be allowed only on application to the court, the clerk not being authorized to tax them as of course. *Mack v. McCulloch*, 2 How. 127; *Stewart v. The Metropolitan Board of Health*, 33 id. 3; S. C. affirmed, 34 id. 31; 3 Abb. N. S. 383; 50 Barb. 192. See *Wheelock v. Hotchkiss*, 18 How. 468, where a contrary rule is laid down.

d. Treble costs. By the provisions of the Revised Statutes (1 R. S. 324 [298], §§ 6, 7), officers of the militia, or persons acting under their command, are, in specified cases, entitled to *treble costs*; and the words "treble costs," as used in the statute, are construed to mean, literally, thrice the amount of single costs, and not single costs with seventy-five per cent added. *Walker v. Burnham*, 7 How. 55. See *Dunbar v. Hitchcock*, 5 Taunt. 820; *Shoemaker v. Nesbit*, 2 Rawle, 201; *Davidson v. Schooley*, 5 Halst. 145; but see *Patchin v. Parkhurst*, 9 Wend. 443.

Treble costs can be obtained only on motion to the court. *Anonymous*, 4 Wend. 216.

Where double or treble costs shall be awarded to any defendant, the same shall be deemed to belong to such defendant; and the counselors, attorneys and other officers, who may have rendered any services in such action to such defendant, and the witnesses and jurors in such action, shall be entitled to receive and retain only the single costs allowed by law for their services respectively. 2 R. S. 617 (641), § 25; *McFarland v. Crary*, 6 Wend. 297; *Moore v. Westervelt*, 3 Sandf. 762; S. C., 1 Code R. N. S. 131.

Section 10. Extra allowance as of right.

a. In general. This subject is regulated by the provisions of the Code, sections 308 and 309, the first of which provides that, in addition to the allowances made in section 307, there shall be allowed to the plaintiff, upon the recovery of judgment by him, in any action for the partition of real property or for the foreclosure of a mortgage, or in any action in which a warrant of attachment has been issued, or for an adjudication upon a will or other instrument in writing, and in proceedings to compel the determination of claims to real property, the sum of ten per

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cent on the recovery, as prescribed in section 309, for any amount not exceeding \$200; and an additional sum of two per cent for any additional amount not exceeding \$1,000. And in the actions above named, if the same shall be settled before judgment therein, like allowances upon the amount paid or secured upon such settlement at one-half the rates above specified.

Section 309 provides that these rates shall be estimated upon the value of the property claimed or attached, or affected by the adjudication upon the will or other instrument, or sought to be partitioned, or the amount found due or unpaid upon a mortgage in an action for foreclosure; and, whenever it shall be necessary to apply to the court for an order enforcing the payment of an installment falling due, after judgment, in an action for a foreclosure, the plaintiff shall be entitled to the rate of allowance prescribed in section 308, but to no more in the aggregate than if the whole amount of the mortgage had been due when judgment was entered. Such amount of value must be determined by the court, or by the commissioners, in case of actual partition.

In difficult or extraordinary cases, where a defense has been interposed, or in such cases where a trial has been had, and in actions or proceedings for the partition of real estate, the court may also, in its discretion, make a further allowance to any party, not exceeding five per cent, upon the amount of the recovery or claim or subject-matter involved.

And in an action for the foreclosure of a mortgage, the court may make a like allowance, not exceeding two and one-half per cent.

The right to the allowances under section 308 exists in a proper case, whether the action be legal or equitable in its nature, or partly legal and partly equitable (*Davis v. Glean*, 14 How. 310); but, in every instance, the action must be such as comes strictly within the description intended by the statute. Thus, an action to foreclose a mechanics' lien is held not to be, within the meaning of the above section, "the foreclosure of a mortgage," nor a proceeding "to compel the determination of claims to real property." *Randolph v. Foster*, 4 Abb. 262; S. C., 3 E. D. Smith, 648. Neither is an action to set aside a conveyance of real estate (*Bridges v. Miller*, 6 Duer, 683); or an action to determine what land should be sold under an assignment (*Powers v. Barr*, 24 Barb. 142), for the "proceedings to compel

Extra allowance as of right.

the determination of claims to real estate," mentioned in section 308, are only those special proceedings authorized by the Revised Statutes, and referred to in section 449 of the Code. *Bridges v. Miller*, 2 Duer, 683.

An action brought by the people, to test the title under royal grants, is, however, within this section (308) of the Code. *People v. Clarke*, 9 N. Y. (5 Seld.) 349 ; affirming S. C., 11 Barb. 337.

In reference to that clause of section 308 which provides for an extra allowance, in an action for an adjudication upon a written instrument, it must be observed, that it is not every such action the decision of which may incidentally involve the construction of a written agreement that is intended ; but an action brought by a plaintiff standing in the position of a trustee, to settle the construction of a will or other instrument creating a trust. *Gray v. Robjohn*, 1 Bosw. 618. The phrase, "adjudication upon a will or other instrument in writing," imports construction and determination upon the instrument exclusively, except in cases where evidence conducive to interpretation is admissible. The construction intended applies to cases in which a court of equity would have been resorted to before the Code, to expound, or to expound and act upon a written instrument. *Lewis v. Bryce* (not reported), cited Voorh. Code (6th ed.), 439.

An action to set aside an assignment as fraudulent by reason of provisions on its face, is, however, within the provisions of the Code ; but otherwise, if the assignment is attacked on grounds outside of itself. *Ib.*

Under section 308, in order to entitle a plaintiff to an extra allowance of costs, he must not only obtain the attachment, but it must also be sustained. Thus, where the plaintiff procures an attachment, which is shown by the defendant to have been set aside and vacated pending the action, the plaintiff is not entitled to the allowance. *Iselin v. Graydon*, 26 How. 95.

In an action of this nature the percentage to which the plaintiff is entitled must be computed on the amount of the verdict ; and if the value of the property attached can control the amount of the percentage in any case, it is only where the value of such property is less than the amount of the recovery, and in actions wherein the summons is not personally served, and the defendant does not appear. *Brace v. Beatty*, 5 Abb. 221. And it has been held, that the percentage should be estimated as above, although

 Extra allowance as of right — Discretionary allowance.

no property has been levied upon under the attachment. *Jackson v. Figaniere*, 15 How. 224.

Allowances in addition to the taxable costs, under the provisions of the Code, cannot be made upon an order disposing of surplus funds arising on the foreclosure of a mortgage. *New York Life Ins. & Trust Co. v. Vanderbilt*, 12 Abb. 458; and where an action is brought for the sole purpose of restraining another action, it is not proper to grant an extra allowance. *Powers v. Wolcott*, 12 How. 565; *Sprong v. Snyder*, 6 id. 11; S. C., 1 Code R. N. S. 178.

Extra allowances can be given only on the recovery of a judgment; and, if there is no recovery of a judgment, there can be no allowance. *Bostwick v. Tioga R. R. Co.*, 17 How. 456. Upon the recovery of a judgment, however, it attaches as a fixed right of the plaintiff, and it is not necessary to move the court in order to obtain the extra percentage allowed. *Hunt v. Middlebrook*, 14 How. 300.

In the actions mentioned in section 308, the court can exercise no discretion as to making any allowance other than that prescribed, and the allowance can be to the plaintiff only. *Williams v. Hernon*, 13 Abb. 297; *McLees v. Avery*, 4 How. 441; *Hotelling v. Marsh*, 14 Abb. 161; S. C., 13 id. 297, n.; *Downing v. Marshall*, 37 N. Y. (10 Tiff.) 380; *Pinder v. Stoothoff*, 7 Abb. N. S. 433.

Section 11. Discretionary allowance.

a. In general. In difficult or extraordinary cases, where a defense has been interposed, or in such cases where a trial has been had, and in actions or proceedings for the partition of real estate, the court may also, in its discretion, make a further allowance to any party, not exceeding five per cent upon the amount of the recovery or claim, or subject-matter involved.

And, in an action for the foreclosure of a mortgage, the court may make a like allowance, not exceeding two and one-half per cent. Code, § 309.

The provisions of this section do not affect the equitable power of the court to grant counsel fees out of a common fund belonging to the parties to the action, as a part of the relief which should be given on the final disposition of the cause. *Hotelling v. Marsh*, 14 Abb. 161.

b. In difficult and extraordinary cases. To bring a case, in which an allowance is asked for, within the provisions of section

In difficult and extraordinary cases.

309, it must be "difficult and extraordinary." The decisions widely differ as to the proper construction of these two terms, and several attempts have been made to define their precise meaning. See *Fox v. Fox*, 22 How. 453; *Woods v. Illinois Central R. R. Co.*, 20 id. 285; *Fox v. Gould*, 5 id. 278; S. C., 3 Code R. 209; *Gould v. Chapin*, 4 How. 185; S. C., 2 Code R. 107.

It was held by some of the earlier decisions that every litigated case was more or less difficult, and that some allowance should therefore be made in all cases. *Niver v. Rossman*, 5 How. 153; *Fowler v. Houston*, 1 Code R. 51; *Schwartz v. Poughkeepsie Ins. Co.*, 10 How. 93; *Dyckman v. McDonald*, 5 id. 121.

A stricter construction was, however, given by other decisions. See *Powers v. Wolcott*, 12 How. 565; *Sands v. Sands*, 6 id. 453; *Gould v. Chapin*, 4 id. 185; S. C., 2 Code R. 107; *Hall v. Prentice*, 3 How. 328; S. C., 1 Code R. 81; 7 N. Y. Leg. Obs. 138; *Howard v. Rome & Turin Plank Road Co.*, 4 How. 416; *Dexter v. Gardner*, 5 id. 417; S. C., 1 Code R. N. S. 80; and the tendency of later decisions is to favor the stricter construction. *Fox v. Fox*, 22 How. 453.

No definite, reliable rule can be laid down that would serve as a guide in every case, and the subject to a great extent must be left to be determined by the peculiar circumstances of each case, and the peculiar views of the judge before whom the application is made as to the subject of costs. See *Sackett v. Ball*, 4 How. 71; S. C., 2 Code R. 47; *Fox v. Gould*, 5 How. 278; S. C., 3 Code R. 209.

Some of the circumstances operating in favor of or against granting an allowance will appear in the following cases. Thus, it has been held, that in an action in which an inquest is taken, for want of an affidavit of merits, but in which no peculiar difficulties are involved, no allowance should be granted (*Hall v. Prentice*, 3 How. 328); nor should an allowance be granted where the difficulties of the case arise from the improper conduct of the successful party, by setting up excessive claims, etc. *Fish v. Forrance*, 5 How. 317; *Sackett v. Ball*, 4 id. 71; *Sands v. Sands*, 6 id. 453.

In an action which was both difficult and extraordinary, brought against principal and surety upon a promissory note, and the surety alone defended and litigated in good faith, but failed in his defense, the plaintiff was refused an allowance

Where a trial has been had.

(*Rice v. Wright*, 3 How. 405), and an allowance was refused where several defendants unnecessarily appear by different attorneys, and each recovered a separate bill of costs. *Tillman v. Powell*, 13 How. 117; *Matthewson v. Thompson*, 9 id. 231. And so the allowance will be refused where actions have been needlessly multiplied. *Sackett v. Ball*, 4 How. 71.

A long trial, extending over an unusual length of time, has been held sufficient to justify an extra allowance, on the ground of its being an "extraordinary case." *Fort v. Gooding*, 9 Barb. 388; *Howard v. Rome & Turin R. R. Co.*, 4 How. 416. See *Fox v. Fox*, 22 How. 453. And where a case has been litigated on both sides with unusual pertinacity, necessarily occupying an unusually long period, and requiring the examination of a large number of witnesses, and difficult questions of law and evidence, and resulting in the recovery of a large amount in favor of the defendant, it is a case coming within the plain meaning and intent of section 309 as being both difficult and extraordinary, and an extra allowance will be granted. *Fox v. Fox*, 24 How. 385.

c. *When a trial has been had.* Another condition for an allowance within the terms of section 309 of the Code is, that a trial has been had, and the prevailing party is then in a proper case, entitled to an additional allowance. *Lowry v. Inman*, 37 How. 286; S. C., 6 Abb. N. S. 394. And where the plaintiff voluntarily submits to a nonsuit, after evidence given, it cannot be objected that there has been no trial within this section (309). *Allaire v. Lee*, 4 Duer, 609; S. C., 1 Abb. 125; *Danenhoefer v. March*, 4 id. 254; *Woods v. Illinois Central R. R. Co.*, 20 How. 285.

The dismissal of a complaint at the circuit, although taken by default, is held to be a trial, and in such case, if it be otherwise a proper one, an allowance may be granted. *Moffatt v. Ford*, 14 Barb. 577; *Rogers v. Degan*, 4 Bosw. 669; 19 How. 119; 10 Abb. 313.

But an assessment before a sheriff's jury, on a default to answer, is not a trial within the section (*Randolph v. Foster*, 3 E. D. Smith, 648; S. C., 4 Abb. 262); nor are proceedings for distribution of surplus moneys in foreclosure. *New York Life Insurance and Trust Co. v. Vanderbilt*, 12 Abb. 458.

The statute in force, at the time the last verdict is rendered in the controversy, governs the allowance as well as the costs. *Jones v. Underwood*, 18 How. 532; *Jackett v. Judd*, id. 385. See, also,

Infants — Amount — Application for.

Moore v. Westervelt, 14 id. 279; S. C., 6 Duer, 684; *Cook v. New York Floating Dry Dock Co.*, 1 Hilt. 556.

d. Infants. Except in a very special case, no extra allowance should be granted by the court, to be charged upon a fund belonging to an infant. *The Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85.

e. Amount. The amount of an allowance, under section 309, is discretionary with the court, within the statutory limits therein prescribed (*Union Bank v. Mott*, 13 Abb. 247); and, when the allowance is to the plaintiff, its amount must be regulated by the amount of his recovery, and not by that of his claim. *Wilkinson v. Tiffany*, 4 Abb. 98; *Saratoga & Washington R. R. Co. v. McCoy*, 9 How. 339. See *Brace v. Beatty*, 5 Abb. 221. But an allowance to the defendant may be computed on the amount claimed by the plaintiff (*Wilkinson v. Tiffany*, 4 Abb. 98), unless in an action for taking specific property, in which case the extra allowance to either party prevailing in the action, must be computed on the value of the property proved on the trial to have been taken, and not on the amount of the damages claimed by the plaintiff. *The Saratoga & Washington R. R. Co. v. McCoy*, 9 How. 339.

In actions for special relief, the value of the property directly affected by the result of the action affords the proper basis for computing the allowance; as, for example, where an action is brought to obtain an injunction to restrain the defendants from discontinuing and removing a railroad. *People v. Albany & Vermont Railroad Co.*, 16 Abb. 465. See *Coleman v. Chauncey*, 7 Rob. 578.

Where the value of the subject-matter in controversy has not been duly ascertained, the objection should be raised upon the application for an allowance, and, if not then made, it will be regarded as waived. *Dresser v. Jennings*, 3 Abb. 240.

Where the cause is twice tried, the allowance to the plaintiff is regulated by the amount of the recovery on the new trial alone. *Sleight v. Hancox*, 4 Abb. 245.

An allowance granted for an amount in excess of the statutory percentage is irregular, and the order granting it may be reviewed upon appeal. *Wilkinson v. Tiffany*, 4 Abb. 98.

f. Application for. Application for an additional allowance can only be made to the court before which the trial is had or the judgment rendered. Sup. Ct., Rule 56.

Application for.

Except in the city of New York, application should not be made to a judge out of court (*Mann v. Tyler*, 6 How. 235); and it should be made in the county where the judgment is rendered, unless some special reasons exist for making it elsewhere (*Niver v. Rossman*, 5 How. 153; S. C., 3 Code R. 192), and made during the term at which the trial was had, and to no other judge than the one who tried the cause. *Sackett v. Ball*, 4 How. 71; S. C., 2 Code R. 47; *Flint v. Richardson*, id. 80; *Van Rensselaer v. Kidd*, 5 How. 242; *Dyckmn v. McDonald*, id. 121; *Osborne v. Betts*, 8 id. 31.

If the cause is tried by a referee application for an allowance must be made to the court, as the referee has no power to pass upon the question of right as to such allowance. *Main v. Pope*, 16 How. 271; *Osborne v. Betts*, 8 id. 31; *Gould v. Chapin*, 4 id. 185; S. C., 2 Code R. 107. And, in such case, the proper course is to obtain and present to the court the referee's certificate of the facts which occurred at the trial. *Fox v. Gould*, 5 How. 278; *Main v. Pope*, 16 id. 271.

The application may be made at the trial without notice, and it is not necessary that the party against whom it is made be present in court (*Mitchell v. Hall*, 7 How. 490; *Van Rensselaer v. Kidd*, 5 id. 242; S. C., 3 Code R. 224); but if the order is not then made, due notice must be given under section 311 of the Code. *Mann v. Tyler*, 6 How. 235; S. C., 1 Code R. N. S. 382; *Saratoga & Washington R. R. Co. v. McCoy*, 9 How. 339; *Howe v. Muir*, 3 Code R. 21; S. C., 4 How. 252.

All litigation should be ended before application is made (*Powers v. Wolcott*, 12 How. 565); but an order granting or refusing an extra allowance is one necessarily made before judgment, and hence, after the entry of judgment, the application comes too late. *Martin v. McCormick*, 3 Sandf. 755; S. C., 1 Code R. N. S. 214; *Clarke v. City of Rochester*, 29 How. 97; S. C. affirmed, 34 N. Y. (7 Tiff.) 355; 30 How. 593. See, *contra*, *Beals v. Benjamin*, 29 How. 101; S. C. affirmed, id. 573.

Where a motion is made for an extra allowance, the grounds upon which the extra allowance is asked must be set forth in the motion papers, so as to enable the court to review them on appeal; and an order granted on improper papers will be reversed on appeal. *Gori v. Smith*, 3 Abb. N. S. 51; S. C., 6 Rob. 563.

 Notice of motion for extra allowance — Counsel fees.

*Notice of motion for extra allowance.**(Title of cause.)*

Take notice, that (on the affidavit and certificate of Edwin Baylies, Esq., the referee herein, of which copies are herewith served, and) on all the proceedings in this cause, the (plaintiff) will move the court, at a special term thereof to be held (by Mr. Justice, A. P.) at , on the day of , 18 , at o'clock in the noon, or as soon thereafter as counsel can be heard, that an allowance be made to him in addition to the usual costs.

*(Date.)**(Signature.)**(Address.)**Order at circuit for extra allowance.**(Title of cause.)**(At a circuit court, etc.)*

The plaintiff in this action having recovered the sum of dollars, and the same being a difficult and extraordinary case (or, the defense having been unfairly or unreasonably conducted), the plaintiff is allowed ten per cent on the amount of such recovery, by way of additional costs.

Section 12. Counsel fees.

a. In general. It is to be observed as a general rule, that the court has no power to authorize an allowance in the taxation of final costs, for counsel fees, nor indeed for any other extra expenses, except as already mentioned, even in actions for special relief. *Whittimore v. Whittimore*, 7 Paige, 38. But in taxing costs as between solicitor and client, courts of equity sometimes allow the party as many of the charges which he would have been compelled to pay his own solicitor, as fair justice to the other party will permit (2 Barb. Ch. Pr. 337), and this power was possessed and exercised by the court of chancery previous to the adoption of the Code (*Irving v. De Kay*, 9 Paige, 521, 533; *Gott v. Cook*, 7 id. 521; *Minuse v. Cox*, 5 Johns. Ch. 441, 451), and is held to be unaffected by any of the provisions of that instrument. *Hotaling v. Marsh*, 14 Abb. 161.

Under the Code, however, there is no such thing as taxation of costs as between attorney and client, to be paid by one party to the other; and the allowance in question, when made, is granted expressly under the name of counsel fees, and paid out of the fund in court. *Downing v. Marshall*, 37 N. Y. (10 Tiff.) 380; *Phelps v. Pond*, cited in *Hotaling v. Marsh*, 14 Abb. 161; S. C. reported on another point, 23 N. Y. (9 Smith) 69. In both these cases the action was brought for an adjudication upon a

Disbursements — Fees of officers.

will, which, it will be observed, is expressly excluded from the provisions of section 309. In *The New York Life Ins. & Trust Co. v. Vanderbilt*, 12 Abb. 458, which was an application for the distribution of surplus funds, arising on foreclosure sales, a similar allowance was granted, to be paid out of the funds.

This allowance, however, will not be made to the counsel of a party having only a contingent interest in the fund in litigation. *Gott v. Cook*, 7 Paige, 521. Neither can these charges be made a part of the judgment against a party to be collected from him personally. *Whittimore v. Whittimore*, 7 Paige, 38.

Section 13. Disbursements.

a. In general. The successful party in an action is entitled to tax, as part of his costs, all his necessary disbursements (Code, § 311), and these are held to include all necessary expenses incurred in prosecuting or defending the action. *Finch v. Calvert*, 13 How. 13.

b. What are allowed. Disbursements are included in, and form part of the costs, and, hence, cannot be recovered where costs are not recovered. *Peet v. Warth*, 1 Bosw. 653. And *necessary* disbursements only are allowed (*Goodyear v. Baird*, 11 How. 377; *Haynes v. Mosher*, 15 id. 216); and they must have been actually paid, or liability for their payment actually incurred, for expenses incidental to the regular proceedings in the action. *Haynes v. Mosher*, 15 How. 216; *Case v. Price*, 9 Abb. 111; S. C., 17 How. 348.

The expense incurred by a party in preparing for an action, or in ascertaining his rights for his own benefit, is not a disbursement in the action. Thus, in an action to recover the possession of lands, the surveyor's fees in procuring the boundaries of the land is not a disbursement in the action which the prevailing party has a right to charge in his costs. *Haynes v. Mosher*, 15 How. 216. The only disbursements allowable in a civil action under the Code are those specified in section 311. *Case v. Price*, 9 Abb. 111; S. C., 17 How. 348; *Hanel v. Baare*, 9 Bosw. 682.

c. Fees of officers. The fees of officers allowed by law are a part of the necessary disbursements (Code, § 311), and this is held to include commissioner's fees on necessary affidavits (*De Witt v. Swift*, 3 How. 280; S. C., 6 N. Y. Leg. Obs. 314; 1 Code R. 24), except such as are made for a motion in the cause (*Burnett v. Westfall*, 15 How. 430); in which case no costs are allowed, and, of course, no disbursements. *Ib.*

Referee's, stenographer's and witness' fees.

Clerk's and sheriff's fees are, also, properly taxable as disbursements (*Benedict v. Warriner*, 14 How. 568; *Case v. Price*, 9 Abb. 111; S. C., 17 How. 348; *De Witt v. Swift*, 3 id. 280; S. C., 6 N. Y. Leg. Obs. 314; 1 Code R. 24), where they are actually charged by such officers (*Case v. Price*, 9 Abb. 111; S. C., 17 How. 348); but where the services for which fees are claimed, are performed by any other person than the officer to whom regular fees are allowed by law, a reasonable compensation only can be taxed for such services. *Ib.*

Fees for copies of papers, and for necessary searches in the clerk's office, and the sheriff's fee of fifty cents for every term during which a cause is on the circuit calendar for trial, are properly taxable. *Case v. Price*, 9 Abb. 111; S. C., 17 How. 348. And so is the expense of procuring a certified copy of an order of reference. *Toll v. Thomas*, 15 How. 315.

d. Referee's fees. The fees of referees are properly taxable as disbursements (Code, § 311); but in the absence of a written agreement of the parties to the contrary, the allowance cannot exceed the rate fixed by law, and a referee is not entitled to charge for services of a third person before whom the parties agree to proceed with the reference, in the referee's absence. *Shultz v. Whitney*, 17 How. 471; S. C., 9 Abb. 71.

e. Stenographer's fees. Fees for stenographer's notes are properly taxable in the first judicial district. Code, § 256; *Sebley v. Nichols*, 32 How. 182; *Reynolds v. Mayor, etc., of New York*, 14 Abb. 176, n. 1. See, *contra*, *Gilman v. Oliver*, 14 Abb. 174; S. C., 9 Bosw. 589; *Arnoux v. Phelan*, 21 How. 88.

f. Witness' fees. The fees of witnesses are also taxable. Code, § 311. But where no subpoena has been used to procure the attendance of witnesses, a party seeking to charge his adversary with witness' fees must show that they were his witnesses in the action, and that they attended at his request or by agreement. *Wheeler v. Dozee*, 12 How. 446; *Taaks v. Schmidt*, 25 id. 340; *Haynes v. Mosher*, 15 id. 216.

And in order that their fees may be taxed, the witnesses must be material and necessary at the time they are subpoenaed. *Wheeler v. Dozee*, 12 How. 446; *Dean v. Williams*, 6 Hill, 376; *Irwin v. Deyo*, 2 Wend. 285; *Pike v. Nash*, 16 How. 63. Thus, a party cannot tax fees for subpoenaing witnesses to attend at a time when he knew they could not be examined. *Crippen v. Brown*, 11 Paige, 628.

Witness' fees.

And so a party who subpoenas a witness to attend the trial of a cause, and permits him to depart before the trial is brought on, cannot tax his fees (*Dowling v. Bush*, 6 How. 410); nor if the witnesses are summoned too late for the trial. See *Clark v. Staring*, 4 How. 243.

But where a party duly subpoenas his witnesses to attend the trial of a cause and pays them their legal fees, he is entitled, if he succeeds in the action, to have such fees taxed in the costs, although the witnesses, after going a part of the distance, returned home on being informed that the court would not be held. *Roth v. Meads*, 20 How. 287. So, where a witness resides at a distance from the court, his fees for attendance on Sunday may be taxed, as well as those for his attendance on other days. *Muscott v. Runge*, 27 How. 85. See *Wheeler v. Ruckman*, 5 Rob. 702.

In an action for slander where forty witnesses were summoned, but two only were sworn to prove the good character of the plaintiff, the court directed that the fees of ten witnesses only should be taxed. *Irwin v. Deyo*, 2 Wend. 285. But where the defendant subpoenaed seventeen witnesses upon an issue which had been previously found against him on a former trial of another action presenting the same issue, when he had examined twelve, but the court allowed him to examine five of the seventeen only, it was held, nevertheless, that he should be allowed to tax fees for all the seventeen. *Lowerre v. Vail*, 5 Abb. 227.

Where a reference is had, and the defendants appear by two different attorneys, two bills of costs are properly allowed, but only one set of witness' fees can be taxed for the same witness, unless affidavits are produced showing that the witness was subpoenaed or requested to attend by both parties. The party who subpoenaed the witness, or made the request, should make the affidavit. *Taaks v. Schmidt*, 25 How. 340. And where there are several causes to be tried at the same time and between the same parties, the fees of a witness required in the several cases may be separately taxed in all, as he need not testify in any one for which he was not paid. *Vence v. Speir*, 18 How. 168; *Hicks v. Brennan*, 10 Abb. 304; *Willink v. Reckle*, 19 Wend. 82. See *Wilder v. Wheeler*, 1 How. 136.

No counsel or attorney in any cause shall be allowed any fee for attending as a witness in such cause. 2 R. S. 651 (671), § 15. But if counsel attend in good faith as a witness, and is retained

 Party as witness — Traveling fees.

as counsel after he arrives at the circuit, his fees are taxable. *Reynolds v. Warner*, 7 Hill, 144. And an attorney may charge a *per diem* allowance for the day on which he was sworn; but not for the mileage. *Taaks v. Schmidt*, 25 How. 340. In districts where day calendars are regularly made up, the party cannot charge for attendance of his witnesses unless the cause was upon the day calendar, except where there was reasonable expectation that the cause would have been reached and placed thereon, and the witnesses resided at a distance from the place of trial. *Ehle v. Bingham*, 4 Hill, 595; *Wheeler v. Ruckman*, 5 Rob. 702; *Curtis v. Dutton*, 4 Sandf. 719.

g. Party as witness. A party to an action is not entitled to tax witness' fees and expenses for his own attendance as a witness, even though he makes affidavit that he attended the trial for the sole purpose of being such witness. *Steere v. Miller*, 30 How. 7; affirming S. C., 28 id. 266; *Cornell v. Potter*, 15 id. 278; *Case v. Price*, 17 id. 348; S. C., 9 Abb. 111; *Christy v. Christy*, 6 Paige, 170; *Perry v. Livingstone*, 6 How. 404; *Logan v. Thomas*, 11 id. 160. In the following cases the rule was held to be otherwise; *Rogers v. Chamberlain*, 7 Abb. 452; *Querissle v. Hilliard*, 3 id. 31; *Logan v. Brooks*, 8 id. 127; S. C., 17 How. 29; *Hanna v. Dexter*, 15 Abb. 135; *Taaks v. Schmidt*, 25 How. 340; *Bronner v. Frauenthal*, 20 id. 355; S. C., 12 Abb. 183; *Howes v. Barber*, 10 Eng. Law & Eq. 465; *Van Dusen v. Bissell*, 29 How. 481.

Where a party is made a witness by his adversary, he is as much entitled to witness' fees as any third person, and, of course, such fees are taxable (*Hewlett v. Brown*, 7 Abb. 74; S. C., 1 Bosw. 655) and so, doubtless, are fees actually and necessarily paid to a co-defendant. *Walker v. Russell*, 7 Abb. 452, note; S. C., 16 How. 91. See, also, *Logan v. Thomas*, 11 How. 160.

h. Traveling fees. As a general rule the traveling fees of witnesses residing but a short distance from the court-house, charged as having been subpoenaed and traveled from a distant county, will not be allowed. If they were temporarily called away from home they should have been subpoenaed in due time. *Mead v. Mallory*, 27 How. 32. But if the party, without his fault or negligence, was compelled to subpoena the witness at his temporary residence or place of business, and such witness attends the court pursuant thereto, and returns, the rule is otherwise. *Clarks v. Staring*, 4 How. 243. So where the witness was sub-

 Commission — Other disbursements.

pcœnaed while away from home and he insisted upon his fee from his residence, which the party paid, it was held that the whole amount was taxable. *Pike v. Nash*, 16 How. 53.

Traveling fees of foreign or other witnesses subpoenaed at the place of trial are not taxable. *Dowling v. Bush*, 6 How. 410; *Peck v. Wood*, 2 id. 209; *Wheeler v. Lozee*, 12 id. 446. Unless they attended as witnesses only, pursuant to request, and were subpoenaed after their arrival. *Ib.*

i. Commission. A reasonable compensation paid to commissioners in taking depositions is taxable, as a disbursement. Code, § 311. See *Finch v. Calvert*, 13 How. 13. And so are the fees of a witness taken under a commission. But if a party desires to tax the fees of a witness residing in another State, and examined there on commission, at a greater rate than that allowed by the laws of our State, he must show that such rate was proper in the State where the examination was had, and that the attendance of the witness could not be procured without payment accordingly. *Dunham v. Sherman*, 11 Abb. 152; S. C., 19 How. 572. The fees of counsel employed abroad on the execution of the commission cannot be charged in the taxation. *Ib.*

j. Other disbursements. Under this head may be included the expense of printing the papers for any hearing, when required by a rule of the court. Code, § 311. But all charges for useless and prolix matter in such papers will be disallowed on taxation. See *Rogers v. Rogers*, 2 Paige, 458; *Crippen v. Brown*, 11 id. 628; *Waller v. Harris*, 7 id. 479.

In case of a reference, expenses paid for room rent, fire and lights, necessary for the purposes of the reference, are held to be properly taxable. *Bailey v. Hanford*, 10 Wend. 622. And it is proper to allow a disbursement, shown to be fair and necessary, for the service of summons and complaint, or for the service of a notice of the object of the action. *Case v. Price*, 9 Abb. 111; S. C., 17 How. 348; *Benedict v. Warriner*, 14 id. 568; *Gallagher v. Egan*, 2 Sandf. 742. And so, even where the service is made by a person other than the sheriff, but in such case the disbursement should not exceed the limit of the sheriff's fee for similar service. *Case v. Price*, 9 Abb. 111; S. C. 17 How. 348.

Expenses incurred for the service of subpoenas under the Code are not taxable; such service being one which a party may always perform himself. *Barnett v. Westfall*, 15 How. 430; *Wheeler v. Lozee*, 12 id. 446.

CHAPTER III.

COSTS ON MOTIONS AND SPECIAL APPLICATIONS.

ARTICLE I.

COSTS ON MOTIONS.

Section 1. In general ; when granted or refused.

a. In general. The Code provides (§ 315) that costs may be allowed on a motion, in the discretion of the court or judge, not exceeding \$10, and may be absolute, or directed to abide the event of the action.

The cases generally, in which the provisions of this section of the Code are applicable, are — where applications are made to the court, or a judge, for any directions made or entered in writing, and not included in a judgment (Code, §§ 400, 401), excepting applications for judgment, upon special verdict, or upon verdict subject to the opinion of the court, or for a new trial on a case made, or where exceptions are ordered to be heard in the first instance at a general term — under the provisions of section 265. Costs, in these exceptional cases, are especially provided for by section 307, subdivision 5, of the Code.

A motion to dismiss a complaint for want of diligence in the prosecution of the action is within the provisions of section 315 (*Tillspaugh v. Dick*, 8 How. 33) ; and, so is a motion for judgment on account of the frivolousness of the pleading. *Gould v. Carpenter*, 7 How. 97 ; *Roberts v. Clark*, 10 id. 451 ; *Marquisee v. Brigham*, 12 id. 399 ; *Rochester City Bank v. Rapelje*, id. 26 ; *Butchers & Drovers' Bank v. Jacobson*, 22 id. 470 ; *Bell v. Noah*, 24 id. 478 ; *Small v. Ludlow*, 1 Hilt. 307. See, *contra*, *Pratt v. Allen*, 19 How. 450 ; *Roberts v. Morrison*, 7 id. 396 ; *Lawrence v. Davis*, id. 354.

The costs of appeals from orders granted on motions are also governed by section 315 (*Savage v. Darrow*, 4 How. 74 ; S. C., 2 Code R. 57) ; but the costs of an appeal from an order of judgment upon a demurrer made after a regular trial, are not within the provisions of this section. *Phipps v. Van Cott*, 15 How. 110.

The court has no power to award costs in anticipation of a

Costs in the cause — When allowed — If not asked for.

motion, which has not yet been made. *Bowne v. Anthony*, 13 How. 301.

b. Costs in the cause. In some cases, the costs of a motion are allowed as "costs in the cause," that is, they are to be added to the costs allowed on the recovery of judgment, if the party to whom they are granted recovers final costs, or deducted from such costs, if the opposite party is finally successful. *Bulkeley v. Keteltas*, 2 Sandf. 735.

In other cases, the costs of a motion are "directed to abide the event of the action" (Code, § 315), that is, they are to be allowed as costs in the cause, to the party finally prevailing in the action; unless they are given only to a specified party, in which case, if he fails in the action, no one gets them.

c. When allowed. The costs of a motion rest in the discretion of the judge by whom the motion is heard, and from his decision there is no appeal (*Dennison v. Dennison*, 9 How. 246; *Dickson v. McElwain*, 7 id. 138), unless this discretion is illegally exercised, or in a plain case of inadvertence or mistake. *Bowne v. Anthony*, 13 How. 301; *Leighton v. Wood*, 17 Abb. 177.

Notwithstanding this discretionary power of the judge relative to costs of motions, there are certain rules by which the courts are governed in the exercise of this discretion, and which it will be proper to notice.

d. Ex parte motions. It is a well-settled rule that no costs can be allowed on *ex parte* motions, in which class are included all motions made in the course of an action, in which the defendant has not appeared. *Bowne v. Anthony*, 13 How. 301. See *Motions, Orders*, etc.

e. If not asked for. Neither will the costs of a motion be allowed, where none are claimed, either in the notice of the motion or upon the argument. *Town of Guilford v. Cornell*, 4 Abb. 220, 225. Thus, as a general rule, costs will not be allowed on granting a motion by default, unless asked for in the notice of motion, or the order to show cause, even though the notice contains a general clause asking "for other and further relief." *Northrop v. Van Dusen*, 5 How. 134; S. C., 3 Code R. 140; *Crippen v. Ingersoll*, 10 Wend. 603; *Mann v. King*, 18 Ves. 297; *Banta v. Marcellus*, 2 Barb. 373.

But, if the parties appear and litigate the motion upon the merits, costs may be allowed in the discretion of the court, whether asked for in the notice of motion, or order to show cause,

Successful party — Too much asked — Needless opposition.

or not. *Banta v. Marcellus*, 2 Barb. 373; *Powell v. Cockerell*, 4 Hare, 557, 572; *Butler v. Gardener*, 12 Beav. 526; *Clark v. Jaques*, 11 id. 623. See, *contra*, *Saratoga and Washington R. R. Co. v. McCoy*, 9 How. 339.

f. Successful party. Costs are allowed, as a general rule, to the party succeeding on the motion, unless he asks for a mere favor, in which case he is not entitled to costs (*Jones v. United States Slate Co.*, 16 How. 129), and if he is himself in fault, costs will usually be awarded against him. *Leighton v. Wood*, 17 Abb. 177.

The moving party is entitled to his costs of motion, notwithstanding the error or irregularity upon which the motion was based has been corrected by the adverse party after the service of the notice of motion. *Hill v. Smith*, 2 How. 242. So where the moving party has been induced to make an application to the court, by the statements of the opposite party, he will be allowed his costs, although the motion be denied. *Leonard v. Manard*, 1 Hall, 200.

g. Too much asked. Where a party in his notice of motion asks for more than he is entitled to, he should be allowed no costs, even though his motion be partially granted. *Bates v. Loomis*, 5 Wend. 78; *Whipple v. Williams*, 4 How. 28; *McKenzie v. Hackstaff*, 2 E. D. Smith, 75; *Steam Navigation Co. v. Weed*, 8 How. 49; *Corbin v. George*, 2 Abb. 465; *Penfield v. White*, 8 How. 87. And although he waives the excessive demands on the hearing. *Bates v. Loomis*, 5 Wend. 78.

So where the notice of motion asks, in the alternative, for two different modes of relief, one of which the party is not entitled to, costs of opposing the motion will be allowed to the opposite party. *Smith v. Jones*, 2 Code R. 33. See *Sturch v. Young*, 5 Beav. 557. And if costs are asked for in any cases where costs are never granted by the court, the moving party, though successful, will be charged with them. *Phelps v. Wasson*, 2 How. 126. So where costs would not otherwise be imposed on denying a motion, a party will be charged with them if, in his notice of motion, he asks costs against his opponent. *Weeks v. Southwick*, 12 How. 170; *Battershall v. Davis*, 23 id. 383.

h. Needless opposition. A party making a needless opposition to a motion will be charged with costs in cases where otherwise he would not be, and so in an ordinary case, where a motion would be granted only upon payment of costs, it will be granted

Unnecessary motions — New questions.

without costs if needlessly and unfairly opposed by the opposite party. *May v. May*, 11 Paige, 201; *Bell v. Judson*, 2 How. 42. See *Kane v. Van Vranken*, 5 Paige, 62.

i. Unnecessary motions. Where a motion is unnecessarily made for no other purpose than that of merely obtaining costs, they will be refused (*Stiles v. Fisher*, 3 How. 52; *Kane v. Van Vranken*, 5 Paige, 62), and where a motion for relief is made in a proper case, and after the service of the motion papers, but where the opposite party consents to its being granted on fair terms, costs of the motion will be withheld. *Stiles v. Fisher*, 3 How. 52.

Where two or more separate motions are made upon substantially the same facts, which might have been presented in a single set of papers, the costs of one motion only will be allowed, the other motions being regarded as unnecessary. *McCoun v. N. Y. Central & Hudson River R. R.*, 50 N. Y. (5 Sick.) 176, 181; *Cortland Co. Mut. Ins. Co. v. Lathrop*, 2 How. 146; *Post v. Jenkins*, 2 id. 33; *Hornfager v. Hornfager*, 6 id. 13. Even though made in different causes brought by the same plaintiff against different defendants, and on different sets of papers. *Cortland Co. Mut. Ins. Co. v. Lathrop*, 2 How. 146. Where one set of papers only is used, the rule is, of course, the same (*Jackson v. Keller*, 18 Johns. 310; *Schermerhorn v. Noble*, 1 Denio, 682; *Jerome v. Boeram*, 1 Wend. 293), and if, in such case, the motions are denied, single costs only will be allowed. *Jackson v. Garnsey*, 3 Cow. 385.

In one case where two motions were made for relief which could have been obtained by one, the motions were granted on payment of the costs of opposing them, as a penalty for unnecessary proceedings. *Mitchell v. Westervelt*, 6 How. 265; S. C. affirmed, id. 311.

j. New questions. Where the questions raised by the motion are new and unsettled, and of such a difficult nature as to justify their submission for the decision of the court, costs are not usually allowed. *Morrison v. Ide*, 4 How. 304; S. C., 3 Code R. 27; *Dollner v. Gibson*, id. 153; S. C., 9 N. Y. Leg. Obs. 77; *Mattice v. Gifford*, 16 Abb. 246; *Northrop v. Van Dusen*, 5 How. 134; S. C., 3 Code R. 140; *Buckman v. Carnley*, 9 How. 180; *Estus v. Baldwin*, 9 id. 80; *Ostrom v. Bixby*, id. 57; *Giraud v. Beach*, 4 E. D. Smith, 27; S. C., 10 How. 369; *Purchase v. Jackson*, 14 id. 230; S. C., 1 Hilt. 357; *Ely v. Holton*, 15 N. Y. (1 Smith) 595, 600;

Defective notice — Setting aside irregularities — Motion for discovery.

Bolles v. Duff, 55 Barb. 580; S. C., 7 Abb. N. S. 385; 38 How. 504. Neither will costs be allowed where the failing party has been misled by conflicting decisions (*Tindall v. Jones*, 19 How. 469; S. C., 11 Abb. 258. See *Giraud v. Beach*, 10 How. 369; S. C., 4 E. D. Smith, 27; *Noble v. Trotter*, 4 How. 322; S. C., 3 Code R. 35); or by the *dictum* of a judge on a new question (*Silliman v. Eddy*, 8 How. 122); or by a decision defectively reported (*Kitching v. Diehl*, 40 Barb. 433); or where he is induced to make the motion by the language of the opinion pronounced by the court which denies it. *Teaz v. Chrystie*, 2 E. D. Smith, 635; 2 Abb. 259.

k. Defective notice. The successful party is entitled to costs, as well when the motion is denied on account of defects in the motion, as when the decision is made upon the merits. *Donaldson v. Jackson*, 9 Wend. 450. But in the former case, *full* costs should not be awarded. *Anonymous*, 18 Wend. 578.

l. Setting aside irregularities. As a general rule, costs will be allowed to the moving party on a motion to set aside irregular proceedings, if the motion is granted (*Kellogg v. Klock*, 2 Code R. 28. See *Beach v. Southworth*, 6 Barb. 173; *Fairweather v. Satterly*, 7 Rob. 546; *McMurray v. McMurray*, 9 Abb. N. S. 315; S. C., 41 How. 41; 60 Barb. 117), subject, however, to the foregoing qualifications.

The same rule applies to the costs of a motion to vacate an *ex parte* order improperly obtained. *Dows v. Parker*, 4 N. Y. Leg. Obs. 384; *Opdyke v. Marble*, 44 Barb. 64; S. C., 18 Abb. 266.

m. Application for allowance. On an application for a discretionary allowance in addition to costs, it seems that neither party is entitled to costs of the motion. *Ten Broeck v. The Hudson River R. R. Co.*, 7 How. 137.

n. Motion for discovery. On a motion for a discovery and inspection of books and papers, the rule is to allow costs to the moving party, where he makes an application therefor, to his opponent, before coming into court, and is refused (*Townsend v. Lawrence*, 9 Wend. 458), otherwise his motion should be granted only upon his paying the costs. *Deas v. Harvie*, 2 Barb. Ch. 448, 456; *King v. Clark*, 3 Paige, 76; *Burnett v. Sanders*, 4 Johns. Ch. 503; *Weymouth v. Boyer*, 1 Ves. Jr. 416, 423.

o. Motion for consolidation. Costs should be allowed to the defendant on a motion for the consolidation of actions against

Motion to change place of trial — Order to fix costs.

him, in cases where the several actions were commenced at the same time or under circumstances evincing a disposition to make the proceedings burdensome to him (*Dunning v. Bank of Auburn*, 19 Wend. 23), unless a satisfactory reason is shown for so doing. *Bank of the United States v. Strong*, 9 Wend. 451.

And, in other cases, if the plaintiff, without reasonable grounds of objection, refuse to consolidate on request, he will be required to pay the costs of the motion. *Dunning v. Bank of Auburn*, 19 Wend. 23. These circumstances must, however, appear affirmatively, or no costs will be allowed. *Ferris v. Betts*, 2 How. 78.

On the denial of a motion to consolidate, costs should be allowed to the plaintiff. *Cooper v. Weed*, 2 How. 40.

p. Motion to change place of trial. Costs, on motion to change the place of trial, should be allowed to abide the event of the action. *Northrop v. Van Dusen*, 5 How. 134; S. C., 3 Code R. 140; *Norton v. Rich*, 20 Johns. 475. See *Morrison v. Ide*, 4 How. 304.

q. Motion for commission. So, upon a motion for a commission to take testimony, costs should be allowed to abide the event, provided the motion has been made with due diligence (*Foster v. Agassiz*, 3 Code R. 150. See *Bank of St. Albans v. Knickerbacker*, 7 Wend. 532); but, if the proceedings in the action have been stayed, the order should be granted only on payment of costs of the motion. *La Farge v. Luce*, 2 Wend. 242.

r. Order on admissions. The costs of a motion, that a party be required to pay part of a claim admitted by him in his pleading to be due, may be included in the order; but the costs of the action in such case can be allowed only upon the recovery of final judgment, and not in the order. *Russell v. Meacham*, 16 How. 193.

s. Order to fix costs. The amount of costs should be fixed in the order awarding them. In cases where a party is required to pay costs as a condition of granting him a favor, the order should specify the amount, or designate some officer to settle the amount; and it is usual in such cases, to provide in the order that the costs shall be fixed by the clerk, or by one of the justices of the court, or by a county judge. *Bowne v. Anthony*, 13 How. 301; *Morrison v. Ide*, 4 id. 304; S. C., 3 Code R. 27; *Chadwick v. Brother*, 4 How. 283; S. C., 3 Code R. 21; *Ellsworth v. Gooding*, 8 How.

Costs on motion for new trial—New trial on a case.

1; *Van Schaick v. Winne*, 8 id. 5; overruling *Thomas v. Clark*, 5 id. 375; S. C., 1 Code R. N. S. 71.

The clerk can make no allowance for costs of a motion, if the order does not do so. *Nellis v. De Forrest*, 6 How. 413; *Mitchell v. Westervelt*, id. 285; S. C. affirmed, id. 311 (n). See, also, *Wesley v. Bennett*, 6 Abb. 12.

Section 2. Costs on motion for new trial.

a. *In general.* A motion for a new trial may be made upon a case or exceptions, or upon the judge's minutes, or it may be made solely upon some ground of favor. See Code, §§ 264, 265.

b. *New trial as a favor.* In cases where a new trial is granted as a matter of favor, it is usually conditioned upon the payment of costs. Thus it is upon these terms that a new trial is granted on the ground of newly-discovered evidence (*Simmons v. Fay*, 1 E. D. Smith, 107. See *Warner v. West. Trans. Co.*, 5 Rob. 490), and the same terms are imposed on granting a new trial for errors or misconduct of the jury only. *North v. Sergeant*, 20 How. 519; 33 Barb. 350; *Harris v. The Panama R. R. Co.*, 5 Bosw. 312; *Ward v. Woodburn*, 27 Barb. 346; *Brown v. Bradshaw*, 1 Duer, 199; *Bank of Utica v. Ives*, 17 Wend. 501; *Conrad v. Williams*, 6 Hill, 444. See *Overing v. Russell*, 28 How. 151; *Pennell v. Wilson*, 2 Abb. N. S. 466, 476; S. C., 4 Rob. 610. But this rule is not applicable where a new trial is ordered on setting aside the report of a referee as against the weight of evidence. *Scranton v. Baxter*, 4 Sandf. 5; *Smith v. Schanck*, 18 Barb. 344; *Wentworth v. Candee*, 17 How. 405. Neither is it applicable in an action of an equitable nature (*Pennell v. Wilson*, 2 Abb. N. S. 466; 4 Rob. 610), and where a new trial is granted on account of a perverse verdict, the costs will abide the event. *Skiffington v. Clark*, 20 Eng. Law & Eq. 356; *Saunders v. Davies*, 14 id. 532. See *Green v. Burke*, 23 Wend. 490; *Knapp v. Curtis*, 9 id. 60; *Van Rensselaer v. Dole*, 1 Johns. Cas. 279.

c. *New trial on a case.* When a new trial is moved for upon a case or exceptions, it rests in the discretion of the court to grant or refuse the costs of the motion; but they are usually ordered to abide the event of the action.

On an application for a new trial on a case made \$20 are allowed, before argument, and for argument \$40. Code, § 307, sub. 5; *Selover v. Wisner*, 37 How. 176; *Rousso v. Vontrin*, 41 id. 8. See *Scudder v. Gori*, 28 How. 155; S. C., 18 Abb. 207; 3 Rob. 329; *Jackett v. Judd*, 18 How. 385. For making and serving a

New trial on judge's minutes — Costs on granting favor.

case \$20 are allowed, and \$10 in addition are allowed where it necessarily contains more than fifty folios. For making and serving amendments to a case, \$10 are allowed. Code, § 307, sub. 3; *Selover v. Wisner*, 37 How. 176.

It has been held that term fees are also taxable, subject to the general rules relating to such fees, for the period during which the motion is necessarily on the calendar, under rule 47 of the supreme court. *Mechanics' Banking Association v. Kiersted*, 10 How. 400; S. C., 4 Duer, 639; *Drake v. Cockcroft*, 9 How. 479; *Van Schaick v. Winne*, 8 id. 5; *Malan v. Simpson*, 20 id. 488; S. C., 12 Abb. 225. See *Hager v. Danforth*, 8 How. 448; *contra*, *Pottsdam, etc., R. R. v. Jacobs*, 10 id. 453; *Jackett v. Judd*, 18 id. 385.

d. New trial on judge's minutes. Where a new trial is granted by the judge on his minutes, costs of a motion seem to be all that are allowable on granting the motion as a right, but the additional costs necessarily incurred may be ordered to abide the event of the action.

Section 3. Costs on granting favor.

a. In general. When a favor is sought by a party to an action which, if granted, will be to the prejudice of the adverse party, it is usual to impose terms, such as the payment of costs, as a condition of granting the favor, unless the party to be prejudiced thereby is himself in fault.

b. Discretion as to costs. If the costs imposed as terms in such cases are to be adjusted before any officer other than the judge granting the order, the adjustment as to the amount of the costs must be made in accordance with certain rules hereafter noticed; but where the costs are adjusted by the judge himself, his discretion, as against the party to whom the favor is granted, is absolute (*Smith v. Dodd*, 4 E. D. Smith, 643), except, no doubt, in a case where such discretion is positively abused, as, for example, if more costs should be exacted as the condition of a favor than could be charged on a final judgment.

Although it seems that an appeal would not lie on such a question, yet the court has corrected errors of this nature when the appeal has been taken on other grounds. *Leighton v. Wood*, 17 Abb. 177; *Union Bank v. Mott*, 11 id. 42; S. C., 19 How. 267; *Bank of Utica v. Ives*, 17 Wend. 501. And the party whose proceedings are vacated by the favor of the court has a right to insist upon a strict adherence to the principles governing

General principles adopted — Amended pleadings.

all such cases. See *Union Bank v. Mott*, 19 How. 267; S. C., 11 Abb. 42.

c. General principles adopted. The general principle observed in all cases where a favor is granted upon payment of costs is, that the party required to pay such costs shall be charged with the costs of all proceedings vacated by the order granted to him. *Van Valkenburgh v. Van Schaick*, 8 How. 271; *Union Bank v. Mott*, 19 id. 267; S. C., 11 Abb. 42; *North v. Sargeant*, 14 id. 223; *Overing v. Russell*, 28 How. 151.

d. Amended pleadings. The general rule in all cases of the amendment of pleadings is, that the amendment shall not be made at the expense of the opposite party, but, on the other hand, that he must be indemnified for all additional expense involved in such amendment. *Union Bank v. Mott*, 11 Abb. 42; S. C., 19 How. 267; reversing S. C., 10 Abb. 372. Thus, where a plaintiff is allowed to amend his complaint, he should be charged with the costs of proceedings before notice of trial, in all cases where a new answer would be required; and, where the amendment is allowed upon demurrer, all subsequent costs are imposed. *Hendricks v. Bouck*, 2 Abb. 360; S. C., 4 E. D. Smith, 461; *Collomb v. Caldwell*, 5 How. 336. And where the plaintiff has been allowed to materially amend his complaint, after the withdrawal of a juror on the trial for the purpose of allowing him an opportunity to make the motion, the same costs as above have been charged. *Smith v. Dodd*, 4 E. D. Smith, 643.

But where, on a decision overruling a demurrer to an answer, the plaintiff is allowed to withdraw his demurrer on payment of costs, he cannot be charged with the costs of proceedings before notice of trial, as such proceedings remain unimpaired. *Phipps v. Van Cott*, 15 How. 110; *Crary v. Norwood*, 5 Abb. 219; *Anonymous*, 3 Sandf. 756; S. C., 1 Code R. N. S. 214; *Nellis v. De Forrest*, 6 How. 413. And so if the defendant is allowed to amend his answer, costs of proceedings before notice of trial will not be charged against him, inasmuch as the complaint would not be thereby affected. *Van Valkenburg v. Van Schaick*, 8 How. 271. Costs thus paid by either party, on leave to amend his pleadings, cannot be deducted from the costs on final judgment against the party so amending. *Considerant v. Brisbane*, 1 Bosw. 644; 7 Abb. 345 (n).

In cases where the court can clearly see that the amendment sought will not necessitate the abandonment or any alteration of

Postponement — New trial.

the proceedings had by the opposite party, costs of the motion only, on granting the favor, will be allowed; and, in such cases, when the error to be amended is merely formal, and the adverse party could not have been misled thereby, costs of the motion even will not be allowed. *Bank of Havana v. Magee*, 20 N. Y. (6 Smith) 355; *Manning v. Dunn*, 14 Barb. 583. See *Clark v. Dales*, 20 Barb. 67; *Vibbard v. Roderick*, 51 id. 616; *Cayuga Bank v. Warden*, 6 N. Y. (2 Seld.) 19, 27; *Lounsbury v. Purdy*, 18 N. Y. (4 Smith) 515.

e. Postponement. It is provided by section 314 of the Code, that, "when an application shall be made to a court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding \$10, besides the fees of witnesses, may be imposed, as the condition of granting the postponement." And in such case no greater amount of costs can be charged. *Noxon v. Bentley*, 6 How. 418.

The costs thus imposed must, however, be paid immediately, and without demand. *Jackson v. Pell*, 19 Johns. 270. And if not so paid, the party entitled to them may proceed with the trial (*Bagley v. Ostrom*, 5 Hill, 516; *Gamble v. Taylor*, 43 How. 375. See *Bulkeley v. Keteltas*, 2 Sandf. 735; S. C., 1 Code R. N. S. 119; *Kirby v. Sisson*, 1 Wend. 83), or he may apply to the court for an order requiring their payment. *Kirby v. Sisson*, 1 Wend. 83. But on adopting the latter course, the application must be made without delay, otherwise they will be allowed only as costs in the cause. *Bulkeley v. Keteltas*, 2 Sandf. 735; S. C., 1 Code R. N. S. 119.

Formerly the payment of such costs might be enforced by an attachment (*Fulton v. Brunk*, 18 Wend. 509); but since the Code, a motion for an attachment in such case was denied. *Vreeland v. Hughes*, 2 Code R. 42.

f. New trial. The costs properly chargeable in a case where a new trial is granted on any other ground than an error of the judge who tried the cause, are the costs of the trial, and of all subsequent proceedings, and no more. *North v. Sargeant*, 14 Abb. 223; S. C., 33 Barb. 350; 20 How. 519. See *Mechanics' Banking Association v. Kiersted*, 4 Duer, 639; S. C., 10 How. 400; *Kennedy v. Harlem R. R. Co.*, 3 Duer, 659; *Brown v. Bradshaw*, 1 id. 199. And where a new trial is ordered, on payment of "costs," without specifying the amount, they are taxable in accordance with the above rule. *Ib.*

Vacating judgment and inquest—Stipulating to try cause.

The rule as laid down has, however, been varied from in some instances. Thus, in one case more costs were granted (*Ellsworth v. Gooding*, 8 How. 1), and in another (*M'Quade v. New York and Erie R. R. Co.*, 5 Duer, 613; S. C., 11 How. 434), less than the rule prescribes.

When a cause is tried, after having been noticed for circuits prior to that at which a verdict is obtained, and a new trial is afterward granted "on payment of costs," the only costs to be paid are those of the circuit or term at which the trial occurred. *M'Quade v. New York and Erie R. R. Co.*, 5 Duer, 613; S. C., 11 How. 434.

Any extra allowance which may have been granted should not be deemed a part of the costs to be paid on granting a new trial (*Ib.*; *Troy & Boston R. R. Co. v. Tibbits*, 11 How. 168; *Hicks v. Waltermire*, 7 id. 370), though it may perhaps be imposed as a condition of opening a judgment. *Ellsworth v. Gooding*, 8 How. 1.

g. Vacating judgment. On vacating, or setting aside a judgment, the costs of entering judgment only are allowed (*Traver v. Silvernail*, 2 Code R. 96; *Dix v. Palmer*, 5 How. 233; *Mann v. Provost*, 3 Abb. 446. See *Millspaugh v. McBride*, 7 Paige, 509; *Tripp v. Vincent*, 8 id. 176); though it has been held that where an extra allowance has been granted under section 308 or 309 of the Code, that should also be paid. See *Ellsworth v. Gooding*, 8 How. 1.

These costs, however, are sufficient only to warrant the opening of the judgment; and if such judgment was founded upon a trial or inquest, the additional costs of setting aside such proceedings will be required, if they also are vacated. *Milleman v. Mayor, etc., of New York*, 18 How. 542.

h. Vacating inquest. On vacating an inquest as a matter of favor, the costs allowed are a trial fee, the clerk's trial fee, witness' fees, costs of subsequent proceedings, if any, and the costs of the motion. *Carpenter v. Truffs*, 2 How. 166; *Riley v. Van Amrange*, 1 id. 43; *Fowler v. Hay*, id. 40; *Deeth v. Purdy*, id. 45. In some cases, under peculiar circumstances, the costs have been ordered to abide the event of the action. *Faulkner v. The Mayor, etc., of Brooklyn*, 2 How. 151; *Quidore v. Van Clief*, id. 201.

i. Stipulating to try cause. When, in granting an order dismissing the complaint, on account of the plaintiff's neglect to

Application for judgment at general term.

proceed with the cause, he is allowed to stipulate to bring the cause to trial, on payment of costs, he should be charged with all the costs to which the defendant is entitled up to that time. *Bowles v. Van Home*, 19 How. 346; 11 Abb. 84.

Section 4. Application for judgment at general term.

a. Submitting controversy. On the submission of a controversy without action for the decision of the general term, under the provisions of section 372 of the Code, costs are in the discretion of the court, or otherwise, in the same cases as where an action is brought. The hearing is, in effect, a trial of the issues of law arising upon the admitted facts, and the costs are those of a trial and not of an appeal (*Neilson v. The Mutual Insurance Co.*, 3 Duer, 683); but no costs are allowed for any proceedings prior to notice of trial. Code, § 373.

b. Special verdict. The party entitled to costs on a special verdict is allowed \$20 for proceedings before argument, and \$40 for argument (Code, § 307), besides term fees, not exceeding \$5, for the period during which the cause is on the general term calendar. *Ib.* See Term Fees, *ante*, 486 to 489.

c. Verdict subject to opinion of court. The costs allowed on this proceeding are the same as those allowed on special verdict. *Ib.*

d. Exceptions first heard at general term. In cases where exceptions are ordered to be heard in the first instance at a general term, under the provisions of section 265 of the Code, the costs are the same as on the last two proceedings just noticed. Code, § 307, subd. 5.

CHAPTER IV.

COSTS ON APPEALS.

ARTICLE I.

IN GENERAL.

Section 1. General principles.

a. Discretionary, when. In all actions the costs of an appeal are in the discretion of the court, whenever a new trial is ordered or when a judgment is affirmed in part and reversed in part (Code, § 306), and the costs on appeals are likewise discretionary with the appellate court in all those actions or proceedings the costs of which are in the discretion of the court below. *Ib.*

The party in whose favor the appeal is decided has an absolute right to costs in all cases other than those just mentioned. *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. (3 Seld.) 459.

b. Separate bills. Although a plaintiff bringing several actions upon the same instrument in the court below can only recover costs in one, being limited to disbursements in the others, yet the rule has no application to appeals from the judgment he may obtain. If separate appeals are brought he may, if successful, recover a separate bill of costs on each appeal (*Pratt v. Allen*, 19 How. 450); but where several defendants unite in one appeal, and there is but one set of papers, one argument, and one judgment, there is but one appeal, and the plaintiff, if successful, is entitled to but one bill of costs, notwithstanding the several defendants appeared by different attorneys. *Everson v. Gehrman*, 2 Abb. 413.

c. Rule as to discretion. The rules by which the court is guided in those cases in which costs are discretionary have been already stated (*ante*, 471, 494, 505, 506), and as they are applicable in most respects to costs on appeals, they need only be referred to in this connection. This difference, however, should be observed, namely, that when a cause has been fairly decided against the appellant by a competent tribunal, he will not be excused from the payment of costs upon his failure in the appellate court, except under very special circumstances. *Mowatt v. Carow*, 7 Paige, 328.

As a general rule, in the court of appeals, costs are awarded

Rule as to discretion — Double costs.

to the successful party, whether appellant or respondent, and whatever may be the nature of the action; and on ordering a new trial, it is an invariable rule of this court to direct the costs to abide the event of the action. The costs, on ordering a new trial, should include all the costs in the cause, both in the court below and in the appellate court. *Jacobsohn v. Belmont*, 7 Bosw. 14; *Robbins v. Hudson River R. R.*, id. 1. It was formerly the practice of the court of appeals to grant no costs, on reversing a judgment in an action for special relief. *Bouchard v. Dias*, 1 N. Y. (1 Comst.) 201; S. C., 1 How. App. Cas. 509. See *Bogardus v. Rosendale Manuf'g Co.*, 1 Duer, 592; S. C., 11 N. Y. Leg. Obs. 125. But this practice seems to be no longer followed under the Code, and it is now usual to give costs to the appellant upon a reversal, where no special circumstances render a different disposition of the question proper. *Montgomery County Bank v. Albany City Bank*, 7 N. Y. (3 Seld.) 459.

Where the appellant succeeds only as to part of the matters of the appeal, neither party, as a general rule, should be allowed costs against the other. *Pickett v. Barron*, 29 Barb. 505; *Duffy v. Duncan*, 32 id. 587; S. C. affirmed, 35 N. Y. (8 Tiff.) 187; *Stafford v. Mott*, 3 Paige, 100. But in a case where the judgment was affirmed in all, except one point of comparatively little importance, costs were awarded against the appellants. *Higbie v. Westlake*, 14 N. Y. (4 Kern.) 281.

When the reversal of a judgment is on points which might have been raised in the court below but which were not there raised, neither party should be allowed costs. *Youngs v. Wilson*, 24 Barb. 510. See *Shaver v. Brainard*, 29 Barb. 25. And where the judgment is affirmed on all points, except these, full costs should be given to the respondent. *Steward v. Green*, 11 Paige, 535; *Jones v. Phelps*, 2 Barb. Ch. 440; *Wallace v. Patten*, 12 Clark & Fin. 491.

Where a judgment is affirmed as to one of two defendants, and reversed as to the other, costs will be allowed in favor of the former and against the latter, in the absence of special circumstances governing costs in such cases. *Montgomery County Bank v. Albany City Bank*, 7 N. Y. (3 Seld.) 459. See *Gardner v. Ogden*, 22 N. Y. (8 Smith) 327.

d. Double costs. A successful appellant is not entitled to recover double costs. *Dockstader v. Sammons*, 4 Hill, 546; *Foster v. Cleveland*, 6 How. 253; *Estus v. Baldwin*, 9 id. 80;

Treble costs — Extra allowance — Dismissal of appeal — Appeal to court of appeals.

Wheelock v. Hotchkiss, 18 id. 468. But a respondent who was entitled to double costs in the court below, is entitled to double costs on the affirmance of the judgment in the appellate court. Thus, where a judgment was obtained against a defendant sued as a public officer, in a justice's court, and on an appeal to the county court the judgment was reversed, and on an appeal brought by the plaintiff to the supreme court the judgment of the county court was affirmed, it was held that the defendant was entitled to double costs on the appeal to the supreme court, but to single costs only upon the appeal to the county court. *Wheelock v. Hotchkiss*, 18 How. 468.

e. Treble costs. The same rules as to double costs on appeals are applicable to treble costs in like cases. *Estus v. Baldwin*, 9 How. 80.

f. Extra allowance. An additional allowance, authorized by sections 308 and 309 of the Code, is confined to the court of original jurisdiction, and in reference to the trial in that court, and cannot be granted by the appellate court. *Wolfe v. Van Nostrand*, 2 N. Y. (2 Comst.) 570; S. C., 4 How. 208; 2 Code R. 130; *Martin v. McCormick*, 3 Sandf. 755; S. C., 1 Code R. N. S. 214; *Van Rensselaer v. Kidd*, 5 How. 242.

g. Dismissal of appeal. In cases in which costs are, under section 306 of the Code, in the discretion of the court, an appeal from a non-appealable proceeding will be dismissed without costs, if it was previously an unsettled question as to whether such proceeding was appealable or not (*Chittenden v. Missionary Society, etc.*, 8 How. 327); and this rule is especially observed if the appellant suffers manifest injustice from the decision below. *New York Ice Co. v. Northwestern Ins. Co.*, 23 N. Y. (9 Smith) 357; S. C., 21 How. 296; 12 Abb. 414. And so where a party, instead of moving to dismiss an appeal, immediately on its being brought, waits until the final hearing on the merits before he raises the question, he will be allowed no costs on its dismissal. *Williams v. Fitch*, 15 Barb. 654.

An appeal will also be dismissed without costs, when the right of appeal is taken away by an act of the legislature, during the pendency of the appeal. *Gale v. Wells*, 7 How. 191; *Porter v. Jones*, id. 192.

Section 2. Appeals to court of appeals.

a. In general. The rules established by the Code, regulating the subject of costs, and which have superseded all former rules

On affirmance or reversal.

inconsistent therewith, are applicable as well to costs in the court of appeals, as in the inferior courts. See *Montgomery County Bank v. Albany City Bank*, 7 N. Y. (3 Seld.) 459. And no distinction is made by the Code, as to the amount of costs in the court of appeals, whether the appeal is from a judgment or from an order in a civil action (*White v. Anthony*, 23 N. Y. [9 Smith] 164. See *Tauton v. Groh*, 9 Abb. N. S. 453; *Hall v. Emmons*, id. 453 (n.); S. C. affirmed, id. 370; reversing S. C., 8 Abb. N. S. 451; 39 How. 187), or from a decision in a special proceeding. *People v. Sturtevant*, 3 Duer, 616; S. C., 12 N. Y. Leg. Obs. 86; 9 How. 304.

An extra allowance, as damages for delay, can be made only on an appeal from a judgment. Code, § 307.

b. Term fees. Previous to the amendment of section 307 of the Code, in 1866, a term fee in the court of appeals was allowed for every term during which the cause was necessarily on the calendar, without any limitation as to the number of terms (*Glentworth v. Mount*, 17 Abb. 15; S. C., 10 Bosw. 699; *Shaw v. Dwight*, id. 18; S. C., 26 How. 163; *Adams v. Perkins*, 25 id. 368; *Hakes v. Peck*, 30 id. 104), but by the amendment of that year, the terms are now limited to ten, excluding the term at which the cause is argued. Code, § 307, subd. 7.

No term fee will be allowed in the court of appeals for any term before the return is filed. *Reformed Dutch Church, etc., v. Brown*, 24 How. 89.

c. On affirmance or reversal. The party recovering costs on an affirmance or reversal is, under the provisions of the Code, entitled to \$30 for proceedings before argument, \$60 for argument, \$20 for preparing and serving a case, besides term fees and disbursements. Code, §§ 307, 311.

Upon affirming a judgment the court may also, in its discretion, award damages for delay, not exceeding ten per cent on the amount of the judgment (Code, § 307, subd. 6), and where such damages are awarded "upon the judgment," in general terms, it is held that the percentage should be computed upon the amount of both the judgments below, including costs at the general as well as the special term, but not upon the interest accrued on the judgments. *Adams v. Perkins*, 25 How. 368.

An award by the court of interest by way of damages for delay, etc., has been held to entitle the successful respondent to simple interest only, to which he would be entitled, in any

On dismissing appeal — Appeals to general term.

case, and not double interest, which the court never allows. *Hoard v. Garner*, 4 Sandf. 677.

d. On dismissing appeal. When an appeal to the court of appeals is dismissed on motion "with costs," the only costs to which the respondent is entitled are for proceedings before argument, and to his disbursements (*Peterson v. Dickel*, 8 Abb. 259), unless "costs of the motion" are also given, in which case he will be entitled to recover \$10 in addition. *Kanouse v. Martin*, 2 Sandf. 737; S. C., 3 Code R. 203.

If the appeal is dismissed at the first term, no term fee will be allowed; such fee being given as a compensation for attending the court and waiting for the call of the cause, and hence is only chargeable when the cause, continuing on the calendar, is not reached, or is postponed. *Ib.*

Where the appeal is dismissed with costs, after argument on the merits, the respondent is entitled to recover full costs, including the fee for argument and also term fees. *Webb v. Norton*, 10 How. 117. See *White v. Anthony*, 23 N. Y. (9 Smith) 164; *Hall v. Emmons*, 40 How. 137; S. C., 9 Abb. N. S. 370.

Section 3. Appeals to general term.

a. Appeals from judgments. A party recovering costs on appeals from a judgment of the special term, or of another court of record to the general term, is entitled to \$20 before argument, and to \$40 for argument (Code, § 307, subd. 5), with the term fees and disbursements stated in a preceding chapter. *Ante*, 484, 500.

b. Appeals from order for new trial. On motion at special term for a new trial upon a case, the same costs are to be given as upon an appeal from a judgment (Code, § 307; *Scudder v. Gori*, 28 How. 155; S. C., 18 Abb. 207; 3 Rob. 629; *Selover v. Wisner*, 37 How. 176), and it is to be clearly inferred that an appeal from an order made on such motion will be subject to the same rule as to costs.

Where an appeal is brought in the supreme court from the county court, the successful party is entitled to full costs under subdivision 5 of section 307 of the Code, notwithstanding the appeal is brought from an order and not from a judgment. *Gray v. Hannah*, 3 Abb. N. S. 183.

When an order granting a new trial as a matter of favor is affirmed on appeal, the respondent will be taxed only with the

Appeals from order on demurrer, special proceedings, and other orders.

costs of the motion below, and not with the costs of the appeal. *North v. Sargent*, 13 Abb. 259.

c. Appeals from order on demurrer. The party succeeding on an appeal from an order sustaining or overruling a demurrer made upon a regular trial, is entitled to recover the same costs as upon the trial of an issue of law. *Van Schaick v. Winne*, 8 How. 5; *Sutherland v. Tyler*, 11 id. 251; *Phipps v. Van Cott*, 15 id. 110. *Nellis v. De Forrest*, 6 id. 413, which holds to the contrary, is overruled by the more recent decisions. See *Ives v. Miller*, 19 Barb. 196.

But where the demurrer is only to part of the pleadings, it has been held that the order upon it is clearly within section 349 of the Code, and that on appeal from such order the rule as above stated has no application, and motion costs only can be taxed. *Drummond v. Husson*, 8 How. 246; S. C., 1 Duer, 633. See *Nolton v. Western R. R. Co.*, 10 How. 97; S. C. affirmed, 15 N. Y. (1 Smith) 444.

d. Appeals from special proceedings. When the decision of a court of inferior jurisdiction in a special proceeding, including appeals from surrogates' courts, shall be brought before the supreme court for review, such proceedings shall, for all purposes of costs, be deemed an action at issue on a question of law from the time the same shall be brought into the supreme court, and costs thereon shall be awarded and collected in such manner as the court shall direct, according to the nature of the case. Code, § 318.

Proceedings to compel the support of a poor relative are within this section of the Code, and on appeal the successful party is entitled to costs. *Haviland v. White*, 7 How. 154.

e. Appeals from other orders. On appeals from other orders costs are the same as upon original motions, and are therefore equally within the discretion of the court, but in no case should they exceed \$10. *Ives v. Miller*, 19 Barb. 196; *Savage v. Darrow*, 4 How. 74; *Drummond v. Husson*, 8 id. 246; 1 Duer, 633.

On affirming an order it is a uniform rule to grant costs, and the sum of \$10 is usually allowed. *Purchase v. Bellows*, 9 Bosw. 642; S. C., 19 Abb. 105.

f. Dismissal of appeal. The rules regulating costs on dismissal of appeals from judgments to the general term are the same as those governing on the dismissal of appeals from judg-

Costs on appeals from justices' courts.

ments in the court of appeals. See *Irving Bank v. Palmer*, July, 1864 (not reported). But, on the dismissal of an appeal from an *order*, \$10 costs only can be allowed.

Section 4. Costs on appeals from justices' courts.

a. In general. Costs on appeals from justices' courts are regulated by the provisions of section 371 of the Code, which first provides for an offer of compromise on the part of the respondent. If no such offer to compromise is made by the respondent, and the judgment in the appellate court turns out to be more favorable to the appellant than the judgment below; or, if such offer is made, but not accepted, and the judgment in the appellate court is more favorable to the appellant than the offer of the respondent, the latter shall recover costs; provided, however, that the judgment appealed from be reversed on such appeal, or be made more favorable to him, to the amount of at least \$10.

In case the offer to compromise is made by the respondent, and accepted by the appellant, the latter is entitled to recover all his disbursements on appeal, and all his costs in the court below. He shall recover costs, however, only as herein provided; and the respondent shall be entitled to recover costs where the appellant is not so entitled to recover them.

Whenever costs are awarded to the appellant, he may tax, as part thereof, the costs and fees paid to the justice on making the appeal, as disbursements, in addition to the costs in the appellate court; and when the judgment in the suit before the justice was against the appellant, he may be further allowed to tax the costs incurred by him, which he would have been entitled to recover in case the judgment below had been rendered in his favor. If, upon an appeal, a recovery for any debt or damages be had by one party, and costs be awarded to the other party, the court shall set off such costs against such debt or damages, and render judgment for the balance.

The following fees and costs, and no other, except fees of officers, disbursements and witnesses' fees, shall be allowed on appeal to the party entitled to costs as herein provided, when the new trial is in the county court:

For proceedings before notice of trial, \$10.

For all subsequent proceedings before trial, \$7.

For trial of an issue of law, \$10.

For every trial of an issue of fact, \$15.

 Costs on appeals from justices' courts.

For argument of a motion for a new trial on a case or a bill of exceptions, \$10.

In all cases, to either party, for every term, not exceeding five, at which the appeal is necessarily on the calendar, and is not tried or is not postponed by the court, \$7.

In other appeals the costs shall be as follows :

To the appellant on reversal, \$15.

To the respondent on the affirmance, \$12.

If the judgment appealed from be reversed in part, and affirmed as to the residue, the amount of costs allowed to either party shall be such sum as the appellate court may award, not exceeding \$10.

If the appeal be dismissed for want of prosecution, as provided by section 364, no costs shall be allowed to either party.

In every appeal the justice of the peace before whom the judgment appealed from was rendered shall receive \$2 for his return.

If the judgment be reversed for an error of fact in the proceedings, not affecting the merits, costs shall be in the discretion of the court.

If, in the notice of appeal, the appellant shall not state in what particular or particulars he claims the judgment should have been more favorable to him, he shall not be entitled to costs unless the judgment appealed from shall be wholly reversed. Code, § 371. A mere general statement in the notice of appeal that the judgment appealed from is too large in amount, or that it ought to have been for a less amount, or any other similar statement, has been held insufficient to entitle the appellant to costs on the appeal, even though the judgment in the appellate court is more favorable to him than the judgment in the court below. *Forsyth v. Ferguson*, 27 How. 67; *Wallace v. Patterson*, 29 id. 170; *Barnard v. Pierce*, 28 id. 232; *Gray v. Hannah*, 30 id. 155; S. C., 1 Abb. N. S. 43; *Hotchkiss v. Banks*, 36 How. 61; *Putnam v. Heath*, 41 id. 262. But it has also been held that a notice by a defendant specifying that "the judgment should have been more favorable to him in this particular, to wit, that said judgment should not have been for more than \$25 damages, besides costs," while bad as a precedent, was sufficient to entitle the appellant to costs, if he recover a judgment in the appellate court more favorable to him than the judgment in the court below. *Younghanse v. Fingar*, 47 N. Y. (2 Sick.) 99; S. C. again, 63 Barb. 299; 43 How. 250. See *Loomis v.*

Appeal transferred to supreme court.

Higbie, 29 id. 232; *Myers v. White*, 37 id. 393; *Fox v. Nellis*, 25 id. 144; *Reed v. Moore*, 31 id. 264. All that the statute requires is, that the modification desired should be clearly and precisely stated, and, if the requisite precision and certainty are attained, it matters not in what language the statement is clothed. *Putnam v. Heath*, 41 How. 262. As to costs where there has been an offer to reduce the judgment, see *Pike v. Johnson*, 47 N. Y. (2 Sick.) 1; and see Appeals, *post*.

Except in cases where the judgment is reversed for an error of fact in the proceedings not affecting the merits, or in cases where the judgment is partly affirmed and partly reversed (Code, § 371), the appellate court has no power to exercise any discretion as to costs. *Ayres v. Western Railroad Corporation*, 49 N. Y. (4 Sick.) 660; *Logue v. Gillick*, 1 E. D. Smith, 398; *Hahn v. Van Doren*, id. 411; *Main v. Eagle*, id. 619; *Garrison v. Pearce*, 3 id. 255; *Snyder v. Goodrich*, 2 id. 84; *Mills v. Winslow*, id. 18; S. C., 3 Code R. 44.

b. *Appeal transferred to supreme court.* Where an appeal from a judgment rendered by a justice of the peace is transferred into the supreme court, because of the incapacity of the county judge to act, the costs are the same as if the appeal had been decided by the county judge, as already stated. *Taylor v. Seeley*, 4 How. 314; S. C., 3 Code R. 84; *O'Callaghan v. Carroll*, 16 How. 327. See *Davis v. Stone*, 16 How. 538.

CHAPTER V.

COSTS ON SETTLEMENT BEFORE JUDGMENT.

ARTICLE I.

IN GENERAL.

Section 1. Costs against defendant.

a. In general. "Upon the settlement, before judgment, of any action mentioned in section 304, no greater sum shall be demanded from the defendant, as costs, than at the rates prescribed by that section." Code, § 322. There is evidently an error in the wording of the latter part of this section, as no rates whatever are prescribed by section 304, and it seems clear that the legislature intended to refer, in this connection, to section 307, which in fact does prescribe the rates allowed. See *Brace v. Beatty*, 7 Abb. 445; *Wilson v. Allen*, 4 How. 54; S. C., 7 N. Y. Leg. Obs. 286; 2 Code R. 26.

The actions mentioned in section 304, and which come within the provisions of section 322, include all those, as a general rule, in which the right to costs follows the judgment as of course. But in other actions—that is, those of an equitable nature—the costs on a settlement rest, in like manner as costs in the cause, in the discretion of the court.

b. Extra allowances. Upon a settlement, before judgment, in any of the actions specified in section 308 of the Code, the plaintiff, if entitled to costs, is also entitled to one-half the extra allowance granted in that section. § 308.

No extra allowance, however, can be granted to the plaintiff, under the provisions of section 309, on such a settlement before judgment in any action specified in section 304. *Brace v. Beatty*, 7 Abb. 445; reversing S. C., 5 id. 221.

Section 2. Costs on discontinuance.

a. In general. As a general rule, applicable alike to equitable and legal actions, the plaintiff will be required to pay costs on discontinuance. *Bedell v. Powell*, 13 Barb. 183; *Marks v. Bard*, 1 Abb. 63; *Seaboard and Roanoke R. R. Co. v. Ward*, 18 Barb. 595; S. C., 1 Abb. 46; *Cooke v. Beach*, 25 How. 356;

Before and after defendant's appearance.

McKenster v. Van Zandt, 1 Wend. 13; *Lewis v. Germond*, 1 Paige, 300; *Pignolet v. Daveau*, 2 Hilt. 584.

b. Before defendant's appearance. Under the former practice a plaintiff was allowed to discontinue, without the payment of costs, as against a defendant who had not actually appeared in the action, even though he may have retained an attorney before the plaintiff discontinued. *Smith v. White*, 7 Hill, 520; reversing S. C., 4 id. 166. And this rule has been held to be still applicable under the Code. *Schenck v. Long*, 14 How. 95. See *Averill v. Patterson*, 10 How. 85; S. C., 10 N. Y. (6 Seld.) 500. See, however, a contrary doctrine, *Weigan v. Held*, 3 Abb. 462; *Foster v. Bowen*, 1 Code R. N. S. 236.

c. After appearance. Where a plaintiff recovers costs against a portion of the defendants, he may discontinue his action, as to a co-defendant who has answered jointly with them, without the payment of costs as to him. *Stafford v. Onderdonk*, 8 Barb. 99; S. C., 2 Code R. 115. So a plaintiff will be allowed to discontinue without the payment of costs, as to a defendant, who was made such by mistake, and who, though not served with the summons, appeared in the action. *Waterbury Leather Manufacturing Co. v. Krause*, 1 Hilt. 560; S. C., 9 Abb. 175 (n.).

Where one of several joint debtors is an infant, the judge at the trial, on the fact of infancy being proved, may, in his discretion, permit the plaintiff to discontinue the action, as against such infant, without costs. *Butler v. Morris*, 1 Bosw. 329. See *Bank of Attica v. Wolf*, 18 How. 102. And where the defendants are all infants, and having obtained goods on credit, interpose the plea of infancy, the plaintiff will be permitted to discontinue without costs. *Van Buren v. Fort*, 4 Wend. 209. But in such case, application for leave to discontinue without costs must be made promptly, and as soon as the plaintiff is informed of the defense; otherwise he will be charged with costs. *St. John v. Hart*, 16 How. 192.

In a case where the defendant withheld from the plaintiff information of a release of the cause of action, of the existence of which the plaintiff was ignorant; and after suit brought, omitted to plead it in the answer, but afterward disclosed it as a defense, when the cause was ready for trial, the plaintiff was allowed to discontinue without costs. *Barante v. Deyermant*, 40 How. 180; S. C., 41 N. Y. (2 Hand) 355.

And the court will allow a plaintiff to discontinue without

After appearance.

costs, if he makes application without unreasonable delay, where he commences an action on the authority of a previous decision which is afterward reversed or overruled. *Sunney v. Roach*, 4 Abb. 16; *Robinson v. Rosher*, 1 Younge & Coll. Ch. 7.

The plaintiff will also be allowed to discontinue without costs, if after the commencement of the action the defendant is sentenced to the State prison (*Fort v. Palmerton*, 19 Wend. 94; *Lackey v. McDonald*, 1 Caines, 116), or is discharged from the obligation of the payment of his debts, under an insolvent or bankrupt law. *Park v. Moore*, 4 Hill, 592; *Lee v. Phillips*, 6 id. 246; *Merritt v. Arden*, 1 Wend. 91; *Young v. Bush*, 36 How. 240; or is discharged from imprisonment for his debts under an insolvency act. *Ludlow v. Hackett*, 18 Johns. 252; *Honeywell v. Burns*, 8 Cow. 121; *Ashworth v. Wrigley*, 1 Hall, 145; *Hart v. Storey*, 1 Johns. 143.

And in all these cases the plaintiff may so discontinue, no matter what may be the form of the action (*Merritt v. Arden*, 1 Wend. 91), and notwithstanding the offer of the defendant to stipulate not to plead the discharge. *Ashworth v. Wrigley*, 1 Hall, 145.

But in order that the plaintiff may be excused from trial and costs, on account of the defendant's insolvency, he must show that the defendant was discharged *after* the commencement of his action (see *Case v. Belknap*, 5 Cow. 422), unless he can make it clearly appear that he had no information of the defendant's discharge, until after the action was commenced. *Smith v. Skinner*, 1 How. 122.

So if the plaintiff, knowing of the defendant's discharge, proceeds in the cause, he must, if he afterward discontinues, pay the costs accruing since the discharge. *Ludlow v. Hackett*, 18 Johns. 252; *Merritt v. Arden*, 1 Wend. 91.

It should be observed that the mere fact of the defendant's insolvency is not of itself sufficient ground for allowing a discontinuance without costs, but there must be an actual discharge under the insolvent act. *Collins v. Evans*, 6 Johns. 334. See *Case v. Belknap*, 5 Cow. 422. If, however, the order for the defendant's discharge has been obtained, it is sufficient, although the certificate of such discharge has not yet been granted. *Park v. Moore*, 4 Hill, 592.

If the defendant will give sufficient security to satisfy any judgment that may be obtained against him, then the plaintiff will not be allowed to discontinue without payment of costs in

cases where he otherwise would be. *Fort v. Palmerton*, 19 Wend. 94.

As a general rule the court is always disposed to permit a plaintiff to discontinue without costs where the defendant, by his own act, renders further proceedings on the part of the plaintiff useless. Thus, where the action was brought for equitable relief and the defendant absconded from the jurisdiction of the court and made relief impossible, the plaintiff was allowed this privilege (*Knox v. Brown*, 2 Bro. C. C. 186; S. C., 1 Cox, 359); and so where the defendant in an action of ejectment gave up the premises to the plaintiff, this privilege was allowed to the latter. *Jackson v. Webb*, cited 1 Cai. 116. If, however, the plaintiff, by his own act or procurement, defeats the object of the action, he cannot be permitted to discontinue without costs. *Hammersley v. Barker*, 2 Paige, 372. Where an executor or administrator, acting as such, brings an action through mistake (*Purdy v. Purdy*, 5 Cow. 14; *Phoenix v. Hill*, 3 Johns. 249), or finds that it would be useless to proceed in consequence of facts subsequently discovered (*Fowler v. Starr*, 3 Denio, 164; *Arnoux v. Steinbrenner*, 1 Paige, 82), he will be permitted to discontinue without the payment of costs, unless he has acted in bad faith. *Phoenix v. Hill*, 3 Johns. 249; *Harris v. Jones*, 3 Burr. 1451.

On an offer by the principal defendant in a foreclosure suit to settle with the plaintiff, the latter may discontinue without the payment of costs to the other defendants. *Gallagher v. Egan*, 2 Sandf. 742. See *Pennell v. Wilson*, 2 Abb. N. S. 466; S. C., 2 Rob. 505.

Where one or more foreign consuls have been joined with other defendants, against whom the action was properly brought, and an injunction order granted, the plaintiff may discontinue without costs as to the consuls, but he can do this only on payment of costs and damages arising from the injunction as to the other defendants; and he cannot do so if such other defendants have interposed a counter-claim. *Taaks v. Schmidt*, 19 How. 413.

d. Discretion of court. Upon the discontinuance of an action as against one of several defendants, the terms imposed upon the plaintiff are wholly discretionary with the special term, and cannot be made the subject of an appeal to the general term. *Waterbury Manufacturing Co. v. Krause*, 1 Hilt. 560; S. C., 9 Abb. 175 (n.)

CHAPTER VI.

OF LIABILITIES OF PARTICULAR PERSONS.

ARTICLE I.

WHO LIABLE AND WHEN.

Section 1. Liability of trustees.

a. In general. Parties to an action standing in a representative or fiduciary capacity are exempted from all personal responsibility for costs, and when awarded against them they are chargeable only upon the property or persons whom they represent, unless directed by the court to be paid by them personally for mismanagement or bad faith in the action or defense. Code, § 317.

b. Who are trustees. Executors, administrators, trustees of an express trust, or a person expressly authorized by statute to sue or be sued on behalf of others, are within the provisions of the statute (Code, § 317), and so, also, are receivers (*St. John v. Denison*, 9 How. 343; *Devendorf v. Dickinson*, 21 id. 275; *Marsh v. Hussey*, 4 Bosw. 614), and assignees in trust for the benefit of creditors. *Avery v. Smith*, 9 How. 349; *Conger v. Hudson River R. R. Co.*, 7 Abb. 255; *Cunningham v. McGregor*, 12 How. 305; S. C., 5 Duer, 648. But where the assignment is void the assignee cannot claim exemption from costs on the ground that he was such. *Sibell v. Remsen*, 30 Barb. 441; S. C. affirmed, 29 How. 574 (n).

The president of a banking association, and the president or treasurer of any other association, suing or sued in its behalf, are clearly within the provisions of section 317 (See *Courtois v. Harrison*, 1 Hilt. 109; S. C., 3 Abb. 96; 12 How. 359. See, *contra*, *Lowerre v. Vail*, 5 Abb. 229); and so are the trustees of a charitable or educational corporation. *Slocum v. Barry*, 34 How. 320; S. C. affirmed, 5 Trans. App. 173; 4 Abb. N. S. 399; 38 N. Y. (11 Tiff.) 46.

c. When trustees are charged. A trustee of any kind must sue *as such*, in order to avoid personal liability for costs, and where he sues in his own right, and is defeated, a special order of the court, under section 317, is unnecessary to charge him

When trustees are charged.

personally. *Murray v. Hendrickson*, 1 Bosw. 635; S. C., 6 Abb. 96.

A receiver should make application to the court for leave to sue as such, and, if he neglects to do so, he will not be exempted from personal liability for costs, in case judgment is recovered against him. *Phelps v. Cole*, 3 Code R. 157; *Smith v. Woodruff*, 6 Abb. 65. See vol. 1, p. 198. See *People v. Judges of Albany Mayor's Court*, 9 Wend. 486.

Where, however, a receiver, as such, brings an action in good faith, he will not be held liable for costs for not proceeding to trial, where a good reason is shown for not trying, pursuant to notice or stipulation. *Purdy v. Purdy*, 5 Cow. 14; *St. John v. Denison*, 9 How. 343; *Reeder v. Seeley*, 4 Cow. 548; *Arnoux v. Steinbrenner*, 1 Paige, 82; *Phoenix v. Hill*, 3 Johns. 249.

The plaintiff, in an action against an executor or administrator, is entitled to costs in the same manner as he would have been entitled to them in an action against the deceased in his lifetime; and the judgment should, in all such cases, direct that the costs recovered shall be collected out of, or charged upon, the estate or assets in the hands of the executor or administrator. But, if the defendant has been guilty of mismanagement or bad faith in the defense, the court may direct the costs to be paid by the defendant personally. This, however, cannot be done where the defendant is exempt by the provisions of the Revised Statutes. 2 R. S. 90, § 41; *Fish v. Crane*, 9 Abb. N. S. 252. See *Howe v. Lloyd*, 9 Abb. N. S. 257; S. C., 2 Lans. 335; *Smith v. Patten*, 9 Abb. N. S. 205. In *Holdridge v. Scott*, 1 Lans. 303, it is held that executors and administrators are personally liable for costs, of course, in those cases in which they bring actions in their representative capacity, and fail, when they might have sued in their own name; and that it is only where they *necessarily* bring actions in their representative character that they escape liability for costs on failing in the action, and that even then they may be charged personally with costs, in case of mismanagement or bad faith.

And this mismanagement or bad faith must be understood as relating to the commencement of the action and the proceedings therein, and not to the conduct of the trustee generally in the management of the trust. *Kimberly v. Stewart*, 22 How. 281. See *Kimberly v. Blackford*, 22 How. 443.

Trustees, how charged — Costs against estates of deceased persons.

d. Trustee, how charged. A trustee cannot, in any case, whether as plaintiff or defendant, be charged with costs, without an express order of the court; and the taxation of costs against a trustee, without leave, is a substantial defect in the judgment which will entitle him to relief. *Woodruff v. Cook*, 14 How. 481. See *Howe v. Lloyd*, 9 Abb. N. S. 257; S. C., 2 Lans. 335.

In an action in the supreme court, where a motion for costs against executors or administrators is made at a term of the court not held by the same judge before whom the trial was had, the certificate of the judge before whom the trial was had must be presented, showing what facts bearing on the question of costs appeared on the trial. *Parkhill v. Hillman*, 12 How. 353.

e. Party represented. Where two persons sue as co-executors and fail in the action, the fact that one of them was beneficially interested in the recovery is not a sufficient ground for charging him with costs. *Finley v. Jones*, 6 Barb. 229.

Neither can a judgment creditor be charged with the costs of an action brought by a receiver appointed in supplementary proceedings under the judgment, unless such action was brought by his direction (*Wheeler v. Wright*, 23 How. 228; S. C., 14 Abb. 353; *McHarg v. Donnelly*, 27 Barb. 100); but if the action is brought by the direction and for the benefit of such creditor, he will be chargeable with the costs. *McHench v. McHench*, 7 Hill, 204.

Section 2. Costs against estates of deceased persons.

a. In general. Under the Revised Statutes no costs could be recovered in an action against an executor or administrator to be levied of his property, or of the property of the deceased, unless it should appear that the demand on which the action was founded was presented within the time mentioned in the notice required to be published for the presentation of claims against the estate, and its payment was unreasonably resisted or neglected, or that the defendant refused to refer the same pursuant to the provisions of the statute. 2 R. S. 90, § 41. The provisions of section 41 are held to be still in full force, and that not only executors, etc., themselves, but also the estates which they represent, are exempt from liability for costs in such cases, under the Code, as well as formerly. *Belden v. Knowlton*, 1 Code R. N. S. 127; S. C., 3 Sandf. 758. See *Smith v. Patten*, 9 Abb. N. S. 205; *Howe v. Lloyd*, id. 257; S. C., 2 Lans. 335; *Holdridge v. Scott*, 1 id.

303; *Morgan v. Skidmore*, cited 9 Abb. N. S. 253 (n.) See, *contra*, *Fish v. Crane*, 9 Abb. N. S. 252.

The plaintiff is, in either one of the alternatives mentioned in the statute, entitled to costs. Thus, where the claim for costs on the ground that the demand was unreasonably resisted has been successfully defended, it may nevertheless be sustained on the single ground that the defendant refused to refer the claim pursuant to the provisions of the statute. *Gorham v. Ripley*, 16 How. 313. See, also, *Bogardus v. Bullock*, 1 Denio, 278 (n.)

b. In what actions. The provisions of the statute have not been extended by the Code to equitable actions, and costs in such actions, even against executors, etc., are wholly within the discretion of the court (*Van Piper v. Poppenhausen*, 43 N.Y. (4 Hand) 68; *Yorks v. Peck*, 9 How. 201; *Benedict v. Caffé*, 3 Duer, 669. See *Sands v. Craft*, 10 Abb. 216; S. C., 18 How. 438; *Barker v. White*, 3 Keyes, 617); and it has been held that this provision has application only to demands existing against the deceased in his life-time, and not to any claim created since his decease, by or under the supervision of the executors. *Smith v. Patten*, 9 Abb. N. S. 205. So it has been held not to apply to actions commenced against persons in their life-time and revived after their decease against their legal representatives. *Mitchell v. Mount*, 17 Abb. 213; *Tindal v. Jones*, 11 id. 258; S. C., 19 How. 469; *Lemen v. Wood*, 16 id. 285; *Benedict v. Caffé*, 3 Duer, 669. See, *contra*, *McCann v. Bradley*, 15 How. 79; *Theriot v. Prince*, 12 id. 451.

c. Presentation of claims. Unless the whole of the claim made in the action is presented to the executor or administrator of the estate before suit, and within the period duly prescribed by the executor's notice, no costs can be recovered (*Wallace v. Markham*, 1 Denio, 671; *Knapp v. Curtiss*, 6 Hill, 386; *Belden v. Knowlton*, 3 Sandf. 758; S. C., 1 Code R. N. S. 127; *Bradley v. Burwell*, 3 Denio, 261; *Bullock v. Bogardus*, 1 id. 276); and this is the rule although the claim did not arise until after the expiration of the time required, if the plaintiff was in any sense a creditor of the estate. *Bradley v. Burwell*, 3 Denio, 261.

A creditor, on presenting a claim against an estate, need not make oath of the justice thereof, unless required to do so by the executor or administrator; and such claim may be presented previous to the publication of notice to creditors, and if then positively rejected, it need not be presented again. *Russell v. Lane*, 1 Barb. 519; *Gansevoort v. Nelson*, 6 Hill, 389.

Unreasonable resistance and neglect.

The fact that an executor, etc., omits to advertise for the presentation of claims does not render either him or the estate liable for costs; nor does it excuse the plaintiff from presenting his claim before suit. *Snyder v. Young*, 4 How. 217; *Fort v. Gooding*, 9 Barb. 388; *Comstock v. Olmstead*, 6 How. 77; *Van Vleck v. Burroughs*, 6 Barb. 341; *Russell v. Lane*, 1 id. 519. See *Bucklin v. Chapin*, 35 How. 155; S. C., 53 Barb. 488; 1 Lans. 443.

d. Unreasonable resistance. It is held not to be unreasonable to resist a claim which the executor has good reason to suppose is in part or wholly unfounded, even though such impression turns out to be erroneous (*Stephenson v. Clark*, 12 How. 282; *Comstock v. Olmstead*, 6 id. 77), and especially where the executor acts under advice of counsel. *Proude v. Whiton*, 15 How. 304. And a claim which is materially reduced on the trial cannot be said to have been unreasonably resisted (*Buckhout v. Hunt*, 16 How. 407; *Cruikshank v. Cruikshank*, 9 id. 350; *Comstock v. Olmstead*, 6 id. 77; *Russell v. Lane*, 1 Barb. 519; *Robert v. Ditmas*, 7 Wend. 522; *Carhart v. Blaisdell*, 18 id. 531; *Woodin v. Bagley*, 13 id. 453), even in a case where the defendant offers no evidence to controvert the claim. *Lansing v. Cole*, 3 Code R. 246. A moderate deduction, however, not arising from the rejection of any separate item claimed, or from a counter-claim, but merely made on account of a difference of opinion as to the value of services actually performed, is not sufficient to excuse the estate from costs. *Fort v. Gooding*, 9 Barb. 388. The burden of proof rests upon the plaintiff, to show that his claim was unreasonably resisted, and as part of such proof he must show that the defendant had sufficient assets to pay his claim. *Bullock v. Bogardus*, 1 Denio, 276; *Nicholson v. Showerman*, 6 Wend. 554; *Carhart v. Blaisdell*, 18 id. 531.

e. Unreasonable neglect. An executor or administrator will be afforded a reasonable time for inquiry and examination after the presentation of a claim, according to the nature of the case, and cannot be charged with neglect until the lapse of such time. Thus, where letters testamentary were issued thirty-four days before the claim was presented, and an action commenced upon it fifteen days after its presentation, it was held that the claim had not been unreasonably neglected. *Buckhout v. Hunt*, 16 How. 407. See, also, *Knapp v. Curtiss*, 6 Hill, 386; *Stephenson v. Clark*, 12 How. 282; *Russell v. Lane*, 1 Barb. 519.

Refusal to refer—Costs, how allowed.

f. Refusal to refer. The executor is also entitled to a reasonable time in which to decide whether or not he will consent to a reference (*Knapp v. Curtiss*, 6 Hill, 386), and in order to charge the estate with costs on the ground of a refusal to refer a claim, it must affirmatively appear that there was such a refusal by the legal representative (*Stephenson v. Clark*, 12 How. 282), and also that the plaintiff offered to refer his claim. *Proude v. Whiton*, 15 How. 304; S. C. affirmed, 15 id. 305 (n.); *Stephenson v. Clark*, *supra*, overruling *Fort v. Gooding*, 9 Barb. 394; *Swift v. Blair's Executrix*, 12 Wend. 278; *Harvey v. Skillman's Executor*, 22 id. 571.

It has been held that an unqualified rejection of the claim, on the part of the executor, though unaccompanied with any offer to refer, is not equivalent to a refusal to refer (*Buckhout v. Hunt*, 16 How. 412; *Proude v. Whiton*, 15 id. 304), and that neither is the refusal by the executor of an offer to arbitrate. He can only be asked to refer in the manner prescribed by the statute. *Swift v. Blair*, 12 Wend. 278; *Cruikshank v. Cruikshank*, 9 How. 350. It seems, however, that a neglect or refusal to answer a proposition or offer to refer might be deemed a refusal. See *Proude v. Whiton*, 15 How. 304. It is not a sufficient compliance with the statute for the executor to offer to refer the claim to referees, all of whom are named by himself, and if he insists upon doing so, it will be regarded as equivalent to a refusal to refer. *Gorham v. Ripley*, 16 How. 313.

An offer to refer an account, presented to administrators or executors, is good if made by parol, and need not be in writing. *Lanning v. Swarts*, 9 How. 434.

g. Costs, how allowed. Costs against the estate of a deceased person can be allowed only upon the special order of the court, and if taxed without such order they will be stricken out, on motion. *Howe v. Lloyd*, 2 Lans. 335; S. C., 9 Abb. N. S. 257; *Mersereau v. Ryerss*, 12 How. 200; *Weeks v. Wanmaker*, 2 id. 15; *Knapp v. Curtiss*, 6 Hill, 386; *Winne v. Van Schaick*, 9 Wend. 448; *Snyder v. Young*, 4 How. 217.

Referees have no power to allow costs against the executor or administrator personally, or against the estate he represents. *Mersereau v. Ryerss*, 13 How. 200. Where the motion for costs is made at a term of the court not held by the same judge before whom the trial was had, a certificate should be procured from the judge who tried the cause, showing what facts bear-

Costs against infant plaintiffs.

ing on the question of costs appeared on the trial. *Parkhill v. Hillman*, 12 How. 353 ; 2 R. S. 90, § 41. And when the cause is tried before a referee his certificate should be procured. *Mersereau v. Ryerss*, 12 How. 300.

A statement in the certificate of the judge that the claim was "unreasonably resisted," or "neglected," etc., is not conclusive as to costs. *Gansevoort v. Nelson*, 6 Hill, 389 ; overruling *Foot v. Gumaer's Executors*, 12 Wend. 195. And such a certificate by a referee is no evidence whatever. *Comstock v. Olmstead*, 6 How. 77 ; *Buckhout v. Hunt*, 16 id. 407.

Section 3. Costs against infant plaintiffs.

a. In general. The responsibility of the guardian *ad litem*, for the costs in an action by an infant plaintiff, is expressly provided for by section 316 of the Code ; and if costs are adjudged against such infant, payment thereof may be enforced against the guardian by attachment.

This attachment means a process in the nature of a *ca. sa.*, and the issuing of it results simply from the adjudication against the infant plaintiff. It is, therefore, not strictly necessary for the defendant to first issue his *execution* against the infant, in order to fasten the liability upon the guardian, and thus become entitled to his attachment, though this perhaps is the better practice. Nor is there any necessity for an order of the court to first bring the guardian into *contempt* before the attachment can issue. *Grantman v. Thrall*, 31 How. 464.

The poverty of the guardian is of course no defense to a motion for the attachment. *Ib.*

If there is a fund in court belonging to the infant, and the court is satisfied that the action was brought in good faith by the guardian, and with a *bona fide* intent to benefit the infant, the defendant's costs may be directed by the court to be paid out of such fund. *Waring v. Crane*, 2 Paige, 79 ; *Taner v. Ivie*, 2 Ves. Sr. 466 ; *Pearce v. Pearce*, 9 Ves. 548 ; *Whitaker v. Marlar*, 1 Cox, 285.

A plaintiff is personally responsible for costs, though he was an infant when the action was commenced, if, on coming of age, he assumes and continues it ; but if, on coming of age, he refuses to proceed with it, he is not so responsible unless the action was properly brought, in which case he must pay the costs of his guardian, and also the costs of the defendant, on discontinu-

ance. *Waring v. Crane*, 2 Paige, 79; *Turner v. Turner*, 2 Stra. 708; *Anonymous*, 4 Madd. 461.

If the court directs a discontinuance of an action during the infancy of the plaintiff, as being adverse to his interests, the costs must be paid by his guardian. *Bowen v. Idley*, 6 Paige, 46, 53.

It is only a very special case that will justify the court in granting an extra allowance against an infant in any event. *Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85.

Section 4. Liability of people for costs.

a. In general. In all civil actions prosecuted in the name of the people of this State by an officer duly authorized for that purpose, the people shall be liable for costs in the same cases, and to the same extent, as private parties. If a private person be joined with the people as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the people till after the execution issued therefor against such private party and returned unsatisfied. Code, § 319.

In an action prosecuted in the name of the people of this State for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted and not against the people. Code, § 320.

Actions commenced by the district attorney in the name of the people, under the act of April 15, 1857, establishing "the metropolitan police district," etc. (see Laws 1857, ch. 628, § 21), are not within the provisions of section 320 of the Code, and, where defendants succeed in such actions, the people are liable for the costs of the defense, to be paid from the State treasury. *People v. Tremain*, 17 How. 10; reversed, on another point, id. 142; S. C., 29 Barb. 96. On sufficient facts shown, an extra allowance may be granted against the people of the State, bringing an action as such, as well as against any private individual. *People v. Clarke*, 9 N. Y. (5 Seld.) 349; affirming S. C., 11 Barb. 337.

Section 5. Liability of assignees pending suit.

a. In general. In actions in which the cause of action shall, by assignment, after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such person shall be liable for the costs in the same

 Liability of attorneys for costs.

manner as if he were a party, and payment thereof may be enforced by attachment. Code, § 321.

The liability of any one for costs, under this section of the Code, is no greater than if he were the original party who commenced the action. Hence, an assignee in trust for the benefit of third persons does not become liable, under its provisions, unless he is also liable under section 317 of the Code. *Conger v. The Hudson River R. R. Co.*, 7 Abb. 255.

The assignment of an interest in a demand as collateral to a debt does not thereby render the assignee liable for costs under the provisions of this section, where the assignor still remains liable for the debt until paid, and himself continues the prosecution of the action. *Wolcott v. Holcomb*, 31 N. Y. (4 Tiff.) 125. If, however, the assignee is interested in and assists to carry on the action, he becomes liable for costs. *Schoolcraft v. Lathrop*, 5 Cow. 17; *Carnahan v. Pond*, 15 Abb. 194.

If an assignee becomes liable at all, pending the action, he is liable for the costs which had accrued before, as well as those which may arise after the assignment. *Jordan v. Sherwood*, 10 Wend. 622; *Miller v. Franklin*, 20 id. 630; *Creighton v. Ingersoll*, 20 Barb. 541. See *Richardson v. White*, 27 How. 155.

The provisions of section 321 of the Code are broader than the former practice of the courts, or the corresponding provisions of the Revised Statutes. 2 R. S. 619, § 44. The former embrace the case of one defending an action in the name of the defendant on the record, and of a respondent on appeal; whereas the latter only made one "bringing suit" in the name of another liable for costs. *Miller v. Adsit*, 18 Wend. 672; *Bendernagle v. Cocks*, 19 id. 151; *Ryers v. Hedges*, 1 Hill, 646. The provisions of the Code, however, require that the cause of action should have become the property of the person sought to be charged, by means of an assignment or otherwise. *Wolcott v. Holcomb*, 31 N. Y. (4 Tiff.) 126.

Section 6. Liability of attorneys for costs.

a. In general. In the cases where, according to the provisions of the statute, a defendant, at the commencement of a suit, is entitled to require security for costs, the attorney for the plaintiff is himself liable for such costs, to an amount not exceeding \$100, until security for costs is filed pursuant to the statute, whether such security shall have been required by the defendant or not. 2 R. S. 621, § 7 (see vol. 2, 564, 570, 571). The attorney

Non-resident clients — In other cases.

may, however, relieve himself from such liability by filing security for costs, and giving notice to the defendant or his attorney. 2 R. S. 621, § 8.

b. Non-resident clients. In order to compel the payment of costs by the attorney, in case of a non-resident plaintiff, it must appear affirmatively that the plaintiff was a non-resident at the time the action was commenced. *Moir v. Brown*, 9 How. 270; *Long v. Hall*, 1 Code R. N. S. 114; S. C., 3 Sandf. 729; *Alexander v. Carpenter*, 3 Denio, 266 (vol. 2, 564-571).

By obtaining an order that the plaintiff file security for costs, the defendant does not abandon his claim on the plaintiff's attorney for their payment; and the latter remains liable until security is actually filed. *Boyce v. Bates*, 8 How. 495. And this liability may be enforced by an execution against the personal property of the attorney, but in no other way. *Boyce v. Bates*, 8 How. 495.

c. In other cases. An attorney commencing an action without being retained for that purpose, and failing in it, will be required to pay the defendant's costs. *Anonymous*, 2 Cow. 589. And, in some cases, attorneys will be required to pay costs, as where they are incurred solely by their gross negligence or fraud, even though duly retained in the action.

CHAPTER VII.

ATTORNEY AND COUNSEL FEES.

ARTICLE I.

GENERALLY CONSIDERED.

Section 1. Attorney's fees, how regulated.

a. In general. The old fee-bill, which was formerly the measure of compensation between the attorney and client, has been abolished by the Code (section 303), and the attorney's compensation for his services is now governed wholly by the express or implied agreement between him and his client. *Stow v. Hamlin*, 11 How. 452; *Moore v. Westervelt*, 3 Sandf. 762. In the absence of any express agreement between them, the attorney is entitled to such compensation as his services are reasonably worth. *Ib.*; *Garr v. Mairet*, 1 Hilt. 498; *Bartle v. Gilman*, 18 N. Y. (4 Smith) 260; S. C., 17 How. 1.

It is no longer illegal for an attorney to enter into a stipulation with his client, to receive for his compensation a share of the proceeds of the action brought by him (*Benedict v. Stuart*, 23 Barb. 420), unless the action be brought for land, in which case such an agreement between the attorney and client would amount to a conveyance of land held adversely, and is expressly prohibited by statute. 2 R. S. 691.

And so an agreement by an attorney, on commencing an action, that he will indemnify the client against the costs which may be recovered against him therein, is void for champerty and maintenance, notwithstanding section 303 of the Code of Procedure. *Brotherson v. Consalus*, 26 How. 213. But it is not unlawful for an attorney to purchase a judgment, for the purpose of enforcing it by execution. *Ib.* Notwithstanding the removal, by the Code, of the restrictions formerly existing, the attorney will not be allowed to use his liberty of agreement as a means of extortion from his client, the court still retaining the power of looking into the arrangements between attorney and client, with a view to the protection of the latter in a proper case. *Barry v. Whitney*, 3 Sandf. 696; S. C., 1 Code R. N. S.

Right to sue for — Lien for costs.

101; *Benedict v. Stuart*, 23 Barb. 420. And the general law regulating transactions between trustees and the beneficiaries of their trust is applicable to the relation of the attorney to his client. See *Howell v. Barker*, 4 Johns. Ch. 118; *Howell v. Ransom*, 11 Paige, 538; *Evans v. Ellis*, 5 Denio, 640; affirming *Ellis v. Messerire*, 11 Paige, 467; *Ford v. Harrington*, 16 N. Y. (2 Smith) 285.

An agreement between an attorney and his client, by which the right of the former to recover fees for his services is made contingent upon his success in the action, is valid, though not reduced to writing. *Fitch v. Gardenier*, 2 Keyes, 516. And the attorney's right to compensation for services rendered in one matter is not forfeited by his misconduct and breach of trust in another matter, entirely distinct from the first. *Currie v. Cowles*, 6 Bosw. 452.

b. Right to sue for. An attorney has a right to bring suit to recover the value of services rendered for his client, but proof of the value of such services must be given on the trial. *Eas-ton v. Smith*, 1 E. D. Smith, 318; *Stow v. Hamlin*, 11 How. 452; *Moore v. Westervoelt*, 3 Sandf. 762. And in such an action the plaintiff is not entitled to recover on no other proof than that shown by the judgment roll. *Stow v. Hamlin*, 11 How. 452. It seems that, where an attorney is conducting several actions for a party, he does not bar his subsequent right to a recovery for services, by commencing an action against his client and attaching his property. *Porter v. Ruckman*, 38 N. Y. (11 Tiff.) 210; S. C., 6 Trans. App. 65.

Section 2. Lien for costs.

a. In general. The Code has not abolished the attorney's lien for his costs. *Rooney v. Second Ave. R. R. Co.*, 18 N. Y. (4 Smith) 368; *Adams v. Fox*, 40 N. Y. (1 Hand) 577. See *Oreighton v. Ingersoll*, 20 Barb. 541; *Ward v. Wordsworth*, 1 E. D. Smith, 598; S. C., 9 How. 16; *Sherwood v. Buffalo, etc., R. R.*, 12 id. 136; *Hall v. Ayer*, 9 Abb. 220; S. C., 19 How. 91; *Haight v. Holcomb*, 16 id. 173; S. C., 7 Abb. 210; but see, *contra*, *Davenport v. Ludlow*, 4 How. 337; S. C., 3 Code R. 66.

For his general balance of costs, an attorney has a lien on all papers, or money, or other property belonging exclusively to his client, which may come into his possession. *St. John v. Diefendorf*, 12 Wend. 261; *Ex parte Sterling*, 16 Ves. 258; *Rex v. Sankey*, 5 Ad. & El. 423; *Jones v. Turnbull*, 2 Mees. & Wels.

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601; *Friswell v. King*, 15 Sim. 191; *Esdale v. Oxenham*, 3 Barn. & Cres. 225.

And for his fees in an action, whether for debt or unliquidated damages, he has a lien on whatever is recovered in the action, even though it does not come into his possession. *Rasquin v. Knickerbocker Stage Co.*, 12 Abb. 324; *Rooney v. Second Ave. R. R.*, 18 N. Y. (4 Smith) 368. And he has a lien not only upon the judgment, but also upon all collateral securities for its satisfaction. *Shackelton v. Hart*, 12 Abb. 325 (n.); S. C., 20 How. 39.

The attorney's lien is not limited to the amount of the statutory costs, but extends to the entire amount of compensation agreed upon between him and his client. *Hall v. Ayer*, 9 Abb. 220; S. C., 19 How. 91. See, also, *Ackerman v. Ackerman*, 14 Abb. 229; *Rooney v. Second Ave. R. R.*, 18 N. Y. (4 Smith) 368. *Contra*, *Haight v. Holcomb*, 16 How. 173; S. C., 7 Abb. 210. An attorney, however, has not a lien on a judgment for a general balance due him. *St. John v. Diefendorf*, 12 Wend. 261; *Lucas v. Peacock*, 9 Beav. 177; *Phillips v. Stagg*, 2 Edw. Ch. 108; *Watson v. Maskell*, 1 Bing. (N. C.) 366.

In any case, an attorney's lien is destroyed by an assignment of his claim to another person and the recovery of a judgment for the amount by the assignee; and a subsequent purchase of the judgment by the attorney will not serve to revive the lien (*Chappell v. Dann*, 21 Barb. 17); so he loses his lien on property in his possession if, by his own act, he parts with such possession to his client, even by mistake (*Dicas v. Stockley*, 7 Carr & P. 587); but if the property be unlawfully taken from his possession, the lien continues. *Ib.*

The acceptance of any security for the claim (*Cowell v. Simpson*, 16 Ves. 275), or of a note in payment, suspends the lien (*Lambert v. Buckmaster*, 2 Barn. & Cr. 616); and in the latter case the attorney cannot retain the client's property as security for the payment of the note. *Ib.* But if, at the time the note is dishonored, any property of the client remains in the possession of the attorney, his lien thereon revives. *Stevenson v. Blakelock*, 1 Maule & Selw. 535; *Davies v. Lowndes*, 3 C. B. 808.

Where the client offers security for the amount shown to be due, the attorney must give up the papers on which he asserts a lien for his claim. *Cunningham v. Widing*, 5 Abb. 413.

b. Rights of lien against third parties. The attorney's lien is valid on notice as against the adverse party to the action, or

Rights of lien against third parties.

any other third person (*Rooney v. Second Av. R. R.*, 18 N. Y. [4 Smith] 368; *Wilkins v. Batterman*, 4 Barb. 47; *Martin v. Hawks*, 15 Johns. 405; *McDowell v. Second Av. R. R.*, 4 Bosw. 670); and it matters not whether such notice or information proceeds from the attorney, or whether such adverse party or third person suspects the existence of the lien and endeavors to evade it. *Ten Broeck v. De Witt*, 10 Wend. 617; *Wilkins v. Batterman*, 4 Barb. 47; *Rasquin v. Knickerbocker Stage Co.*, 12 Abb. 324; S. C., 21 How. 293.

Unless there is some collusion to deprive the attorney of his costs the parties to an action can settle it, if done before judgment, without consulting him (*McDowell v. Second Av. R. R. Co.*, 4 Bosw. 670; *Brown v. Comstock*, 10 Barb. 67; S. C., 3 Code R. 142; *Benedict v. Harlow*, 5 How. 347); but if such settlement is plainly made in fraud of the attorney's rights, he may continue the action and take judgment for his costs (*Rasquin v. Knickerbocker Stage Co.*, 12 Abb. 324; S. C., 21 How. 293; *Keenan v. Durlfinger*, 12 id. 327 (n.); S. C., 19 id. 153; *Owen v. Mason*, 18 id. 156; *Wood v. Northwest Pres. Church*, 7 Abb. 210 (n.)), except in an action for a divorce, in which case the attorney cannot insist upon proceeding upon the ground that his costs are not paid. *Kirby v. Kirby*, 1 Paige, 565.

In case a judgment has been entered on which the attorney has a lien for costs, a collusive settlement between the parties in fraud of his rights will not relieve the debtor from liability to him for such costs. *Rooney v. Second Av. R. R. Co.*, 18 N. Y. (4 Smith) 368; *Ward v. Wordsworth*, 1 E. D. Smith, 598; S. C., 9 How. 16; *Haight v. Holcomb*, 16 id. 173; S. C., 7 Abb. 210.

Where an action is collusively settled before judgment, the plaintiff's attorney will not be allowed an order requiring the defendants to pay the costs. *Talcott v. Bronson*, 4 Paige, 501. His only remedy is to proceed in the action as above mentioned, and he must so proceed at his own risk, and conclusively show that the settlement was made in bad faith, with the intent of evading his claim; and on a failure to do so, his proceedings subsequent to notice of settlement will be set aside. *McDowell v. Second Av. R. R. Co.*, 4 Bosw. 670; *Nelson v. Wilson*, 6 Bing. 568; *Clark v. Smith*, 6 Man. & Gr. 1051; *Francis v. Webb*, 7 C. B. 731.

The defendant's attorney is not allowed to object to any settlement made previous to the decision of the cause (*Shank v. Shoe-*

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maker, 18 N. Y. [4 Smith] 489; *Quested v. Callis*, 10 Mees. & Wels. 18), but after judgment his lien is protected to the same extent as that of the plaintiff's attorney. *Power v. Kent*, 1 Cow. 172.

Where a satisfaction of judgment is entered in fraud of the attorney's lien, it will be set aside on his motion; but the attorney is not at liberty to disregard such satisfaction, and to issue execution on the judgment before the entry of satisfaction is vacated. *Ackerman v. Ackerman*, 14 Abb. 229; *Rooney v. Second Avenue R. R. Co.*, 18 N. Y. (4 Smith) 368.

An attorney cannot enforce his lien against the *person* of the adverse party, if his client has released him, even if such release was collusively made. *Martin v. Francis*, 1 Chit. 241; *Marr v. Smith*, 4 Barn. & Ald. 466.

Where an application is made to the court to interpose in order that the lien of an attorney may be protected, it is within the power of such court to order a reference, to determine the existence and extent of such lien, and the client cannot claim a right to have a jury trial. *Wilkins v. Carmichael*, 1 Doug. 100; *Turwin v. Gibson*, 3 Atk. 720; *Ackerman v. Ackerman*, 14 Abb. 220; reversing S. C., 11 id. 256. But see, *contra*, *Fox v. Fox*, 24 How. 409; *Haight v. Holcomb*, 16 How. 173; S. C., 7 Abb. 210.

CHAPTER VIII.

FEES OF OFFICERS OF THE COURT.

ARTICLE I.

IN GENERAL.

Section 1. Fees of the court.

a. In general. The old fee-bill, as provided for in the Revised Statutes, has been repealed in all its provisions, so far as they relate to clerk's fees for his services in civil actions (*People v. Supervisors of Monroe*, 15 How. 225), and section 312 of the Code provides that he shall receive,

On every trial, from the party bringing it on, \$1 ; on entering a judgment by filing transcript, six cents.

On entering judgment, fifty cents, except in courts where the clerks are salaried officers, and in such courts \$1.

He shall receive no other fee for any services whatever in a civil action, except for copies of papers, at the rate of five cents for every hundred words. Code, § 312.

The clerk is entitled to his trial fee, on trials of issues of law, as well as on trials of issues of fact ; but the right to such fee does not extend to causes on the calendar which are not tried, nor to trials before referees. *Clerk's Fees*, 5 How. 11 ; S. C., 3 Code R. 102. Nor does it extend to a cause called at the circuit, but referred by an order there granted, or to an appeal from a mere order. *Ib.*

Neither is he entitled to such fee, on the dismissal of a complaint for want of progress in the action. *Tillspaugh v. Dick*, 8 How. 33. Nor on an application to the court for judgment upon failure to answer. *Chapman v. Lemon*, 11 How. 235.

The fee will be allowed, however, upon an appeal from a judgment, whether of the same court or of another court, either in an action or special proceeding (*Clerk's Fees*, 5 How. 11 ; S. C., 3 Code R. 102 ; Code, § 318) ; and also upon an argument at general term, of questions reserved at the trial. *Wilcox v. Curtiss*, 10 How. 91.

The clerk is not entitled to charge in any case whatever, for entering any paper or order ; nor for attending on the hearing of

Payment of his fees — Fees of sheriff.

a motion of any kind ; nor can he make any additional charges for his certificate of the correctness of copies of papers. *Clerk's Fees*, 5 How. 11 ; S. C., 3 Code R. 102.

b. *Payment of his fees.* The trial fee is to be paid by the party bringing on the trial. Code, § 312. The fee for entering judgment is to be charged against the party in whose favor it is entered, and this is the rule, even though the costs of the action are awarded to the opposite party. *Burnett v. Westfall*, 15 How. 430.

The clerk, before performing any service, is entitled to insist upon the payment of his fees in advance. If, however, he performs the service without insisting upon payment therefor, he gives credit to the party who is bound to pay them, and must look to him personally. On being paid his fee, the clerk cannot refuse the performance of the service required on account of non-payment by the party for some previous official service, on which he gave credit. *Purdy v. Peters*, 23 How. 328 ; S. C., 15 Abb. 160.

The fee allowed to the clerk for entering judgment means entering the judgment in the judgment book (*Bentley v. Jones*, 4 How. 335 ; S. C., 3 Code R. 87) ; and is not chargeable till the perfecting of the judgment. *Matter of Clerk of Albany County*, 5 How. 11 ; S. C., 3 Code R. 102.

Section 2. Fees of sheriff.

a. *In civil actions.* The fees allowed to sheriffs for their services in civil actions, in all of the counties of this State excepting New York, Kings and Westchester, as prescribed by statute, are as follows :

For serving a summons, or summons and complaint, or summons and notice of object of action, or any other paper issued in any action, the sum of \$1 ; and for necessary travel in making such service the sum of six cents per mile to and from the place of service, to be computed in all cases from the court-house of the county ; and if there are two or more court-houses, to be computed from the nearest to the place of service. *Laws of 1872*, ch. 26. See *Laws of 1871*, ch. 415, § 1.

For taking a bond of a plaintiff in proceedings for the claim and delivery of personal property, or for taking a bond from either the plaintiff or defendant, or any other party, in any case where he is authorized to do so, the sheriff is entitled to a fee of

In civil actions — Fees on executions.

fifty cents. Laws of 1871, ch. 415, § 1. And for a certified copy of every such bond, twenty-five cents. *Ib.*

For taking a bond for the liberties of the jail, \$1. Summoning a jury upon a writ of inquiry, or in any case where it shall become necessary to try the title to any personal property, attending such jury, and making and returning the inquisition, \$2.50.

For summoning a jury in pursuance of the warrant or precept of commissioners appointed to inquire concerning the lunacy, idiocy or habitual drunkenness of any person, for each juror summoned, twenty-five cents; for attending such jury, when required, \$1.

For summoning a jury in any other case, \$1, and for attending the same when required, \$1.

Attending before any officer with a prisoner, for the purpose of having him surrendered in exoneration of his bail, or attending to receive a prisoner so surrendered, who was not committed at the time, and receiving such prisoner into his custody in either case, \$1.

For attending a view, \$2 per day, and for going and returning, eight cents for each mile actually traveled.

For attending any term of the supreme court, or of the county court of any county, \$3 per day. Laws of 1871, ch. 415, § 1.

b. Fees on executions. For serving an attachment for the payment of money, or an execution for the collection of money, or a warrant for the same purpose issued by the comptroller or by any county treasurer, for collecting the sum of \$250 or less, the sheriff is entitled to three cents per dollar; and for every dollar collected more than \$250, the sum of two cents. Laws of 1871, ch. 415.

For mileage on every execution, the sum of ten cents per mile for going only, to be computed from the court-house.

For receiving and entering such execution on their books, and searching for property, fifty cents; which sum shall be a charge against and to be collected of the person by whom the execution was issued, except when he is a county clerk, or of the person in whose favor the judgment was rendered, except as otherwise provided by this act. The said sum of fifty cents, in the case of judgments hereafter recovered, shall be one of the disbursements to be included in the bill of costs taxed in favor of the party entitled thereto.

Fees on executions — Other fees.

In cases where judgment has been already obtained, the said sum shall be collected by the sheriff from the defendant in the execution in the same manner as his other fees are now collected.

The fees allowed by law and paid by such sheriff to any printer for publishing an advertisement of the sale of real estate for not more than six weeks, and for continuing such advertisement more than six weeks, or for publishing the postponement of any such sale, the expense of such continuance or postponement shall be paid by the party requiring the same.

The fees allowed for the service of an execution and for advertising thereon shall be collected by virtue of such execution in the same manner as the sum therein directed to be levied; but when there shall be several executions against the defendant at the time of advertising his property, in the hands of the same sheriff, there shall be but one advertising fee charged on the whole, and the sheriff shall elect on which execution he will receive the same. *Ib.*

For serving an attachment against the property of a debtor under the provisions of chapter 5, second part of the Revised Statutes, or against a ship or vessel, under the provisions of title 8, chapter 8, of part third of the Revised Statutes, the sheriff is entitled to receive \$1, with such additional compensation for his trouble and expenses in taking possession of and preserving the property attached as the officer issuing the warrant shall certify to be reasonable; and when the property so attached shall afterward be sold by the sheriff, he shall be entitled to the same poundage on the sum collected as if the sale had been made under an execution.

For making and returning an inventory and appraisal such compensation to the appraisers, not exceeding \$1 to each per day for each day actually employed as the officer issuing the attachment shall allow, and twenty-five cents per folio for drafting, and twelve and one-half cents per folio for copying the inventory. For selling any property so attached, and for advertising such sale, the same allowance is granted as for sales on execution. *Ib.*

c. Other fees. For drawing and executing a deed pursuant to a sale of real estate the sheriff is entitled to \$2, to be paid by the grantee in such deed. Laws of 1871, ch. 415, § 1, subd. 5.

And for serving a writ of possession, assistance, or of restitution, putting any person entitled into the possession of premises

Who liable for — Fees of referees.

and removing the tenant, \$1.50. The same compensation for traveling to serve such writ is allowed as on the service of a summons. *Ib.*, subd. 6.

d. Who liable for. In civil actions the plaintiff and his attorney are each liable to the sheriff for his fees in serving or executing process, or for any official services rendered in the cause. *Adams v. Hopkins*, 5 Johns. 252. See *Jackson v. Anderson*, 4 Wend. 474; *Judson v. Gray*, 11 N. Y. (1 Kern.) 408. If, however, the sheriff gives credit to the attorney exclusively, he cannot afterward look to the client for payment. *Osterhout v. Day*, 9 Johns. 114.

When a party is permitted by the court to prosecute as a poor person, the sheriff or other person who is required to perform any service therein shall do their whole duty therein without any reward for the same. 2 R. S. 445, § 3; vol. 1, 211.

Where the law requires any official duty to be performed by the sheriff for which no fee is given, and he is not required to perform the same without pay, he is entitled to receive a reasonable compensation therefor. *Gallagher v. Egan*, 2 Sandf. 742; *Smith v. Birdsall*, 9 Johns. 328.

Section 3. Fees of referees. v

a. In general. In the absence of any special agreement between the parties, a referee is entitled to charge \$3 per day, and no more, for every day spent in the business of the reference. Code, § 313. The parties may, however, mutually agree, in writing, upon any other rate of compensation. *Ib.*; *Shultz v. Whitney*, 17 How. 471; S. C., 9 Abb. 71.

A verbal agreement made by the parties, and entered by the referee in his minutes, is such an agreement in writing as to come within the provisions of section 313. *Philbin v. Patrick*, 22 How. 1; S. C. affirmed, 34 id. 629 (*n.*) But the existence of a custom to pay more than \$3 per day, without a written agreement, does not entitle the referee to the payment of such extra sum. *Shultz v. Whitney*, 9 Abb. 71; S. C., 17 How. 471.

Neither is a referee entitled to charge for services of a third person before whom the parties agree to proceed with the reference in his absence, compensation being allowed for the personal services of the referee only. *Ib.*

If any dispute arises as to the amount of the referee's fees, it may be settled by requiring him to have them taxed. *Ib.*; *Richmond v. Hamilton*, 9 Abb. 71.

Fees of referees.

The attorney in an action is not personally responsible for the referee's fees (*Judson v. Gray*, 11 N. Y. [4 Kern.] 408), unless in a case where he has agreed with his client to pay them. *Judson v. Gray*, 17 How. 289.

The referee may recover his fees from the prevailing party, by action, without proving an express promise to pay, and, where there are several referees appointed, each may maintain a separate action for his fees. See *Hinman v. Hapgood*, 1 Denio, 188.

CHAPTER IX.

OF THE ADJUSTMENT OF COSTS.

ARTICLE I.

PROCEEDINGS ON.

Section 1. By whom adjusted.

a. In general. Under the former practice, the authority to tax the costs on the recovery of a judgment in an action was frequently made the subject of statutory enactments. By the provisions of the act of 1813 (1 R. L. 320, § 8), authority to tax costs was conferred upon the clerks, and the Revised Statutes (2 R. S. 282, §§ 34, 37) provided that records of judgments should be signed, and the costs be taxed, by one of the justices, or by the clerk, a circuit judge or supreme court commissioner. So, in the court of chancery, by an act of the legislature, the chancellor was authorized to designate masters to tax costs, who should have exclusive jurisdiction to do so during the pleasure of the court. Laws 1814, ch. 163, p. 187. The same authority was continued by the provisions of the Revised Statutes. 2 R. S. 169, § 5.

The Code does not prescribe, in express terms, either that costs shall be taxed, or by whom they shall be taxed. The power to tax costs is, however, plainly deducible from the three hundred and eleventh section, and is regarded as belonging to the clerk from the language there used, requiring him to insert in the entry of judgment, etc., the sum of the charges for costs as provided in the Code, and the disbursements and fees of officers allowed by law. Code, § 311; *Whipple v. Williams*, 4 How. 28; *Nellis v. De Forest*, 6 id. 413; *Union India Rubber Co. v. Babcock*, 1 Abb. 262; S. C., 4 Duer, 620.

b. Interlocutory costs. Formerly interlocutory costs were adjusted by some officer designated in the order awarding such costs, no officer having the authority to tax them without a special power being thus conferred on him. *Van Schaick v. Winne*, 8 How. 5; *Nellis v. De Forest*, 6 id. 413; *Morrison v. Ide*, 4 id. 304; S. C., 3 Code R. 27. See *Ellsworth v. Gooding*, 8

Final costs — Notice of adjustment.

How. 1. But by the provisions of section 311 of the Code, as amended in 1862, whenever it shall be necessary to adjust costs in any interlocutory proceeding in an action, or in any special proceedings, the same shall be adjusted by the judge before whom the same may be heard, or the court before which the same may be decided or pending, or in such other manner as the judge or court may direct. Code, § 311, subd. 2.

c. *Final costs.* Under the Code final costs are adjusted by the clerk of the court in which the action is pending, and not by the clerk of the appellate court in case of an appeal. *Union India Rubber Co. v. Babcock*, 1 Abb. 262; S. C., 4 Duer, 620. In the supreme court the proper taxing officer is the clerk of the trial county. See Code, § 466.

The court of appeals will interfere in no case with the taxation of costs, except upon appeal from a regular proceeding in the court below. *Dresser v. Brooks*, 2 N. Y. (2 Comst.) 559; S. C., 4 How. 207; 2 Code R. 130.

A county clerk has power to tax costs in special proceedings under the Revised Statutes; he may do so on mandamus, although such costs are not provided for by the Code. *People v. Colborne*, 20 How. 378.

Section 2. Notice of adjustment.

a. *In general.* Notice of the adjustment is required to be given by the prevailing party to the opposite party in the same manner as other notices are served, except that five days' notice is sufficient, and if the attorneys reside in the same city, village or town, only two days' notice is required. Code, § 311.

A copy of the items of costs and disbursements claimed must be served with the notice of adjustment. *Ib.* And this was the rule enforced by the courts previous to its adoption into section 311 of the Code, in 1857. *Gildersleeve v. Halsey*, 3 Sandf. 756; S. C., 1 Code R. N. S. 126; *Shannon v. Brower*, 2 Abb. 377.

A defendant failing to appear in the action is not entitled to notice of adjustment (Code, § 414), but if he appears, even though he omit to answer, he is entitled to such notice. *Ib.*; *Dix v. Palmer*, 5 How. 233; S. C., 3 Code R. 214; *Elson v. The New York Equitable Ins. Co.*, 2 Sandf. 654; S. C., 2 Code R. 30.

If the costs are not taxed on the day noticed for that purpose, the opposite party not appearing, the taxation may be made on a subsequent day without further notice. *Cooper v. Astor*, 1 Johns. Cas. 32.

Time of notice — Omitting due notice — The adjustment.

Where a party swears positively that no notice of adjustment has been received, the party professing to have given it must show the time and manner of service. *Van Wyck v. Reid*, 10 How. 366.

b. Time of notice. It is no objection to a notice of the adjustment of costs that it was given before the right to recover them was established if, at the time of the adjustment, the moving party is entitled to them. *Anonymous*, 4 Sandf. 693. Hence, a notice given in anticipation of a default is regular if the default actually occurs. *Ib.* See *Oathout v. Rooth*, 12 Johns. 151.

c. Omitting due notice. The effect of an omission to give proper notice of the adjustment of costs to the adverse party is to make the adjustment irregular, without affecting the validity of the judgment. There must, however, be a retaxation and adjustment ordered, with costs against the party who should have given notice. *Gilmartin v. Smith*, 4 Sandf. 684; *Richards v. Swetzer*, 1 Code R. 117; S. C., 3 How. 413; *Stimson v. Huggins*, 16 Barb. 658; S. C., 9 How. 86; *Macomber v. Mayor, etc., of New York*, 17 Abb. 35; *Potter v. Smith*, 9 How. 262; *Hoffnung v. Grove*, 18 Abb. 14; *Petrie v. Fitzgerald*, 2 Abb. N. S. 354. The following cases, which hold that the omission to give notice has the effect to render the judgment irregular, are overruled: *Elson v. New York Equitable Ins. Co.*, 2 Code R. 30; S. C., 2 Sandf. 654; *Bank of Masillon v. Dwight*, 2 Code R. 49; *Doke v. Peek*, 1 id. 54; *Goldsmith v. Marpe*, 2 id. 49.

Section 3. The adjustment.

a. In general. The parties having appeared before the clerk at the time and place designated in the notice of adjustment, all objections intended to be made to the form, time or manner of notice should at once be taken, and if not so taken they will be regarded as waived. If no objections are taken, or if taken are overruled by the clerk, the party giving the notice must then present his bill of costs, with his disbursements stated in detail and verified by affidavit. Code, § 311; *Shannon v. Brower*, 2 Abb. 377.

It seems that the clerk has no power to grant an adjournment (*Shannon v. Brower, supra*), except by consent of all the parties. See *People v. Hulburt*, 5 How. 446; S. C., 1 Code R. N. S. 75; 9 N. Y. Leg. Obs. 245. And where from any cause the clerk is unable to attend on the day appointed, a new notice of adjustment must be given. *Bissell v. Dayton*, 2 How. 80.

Bill of costs — The affidavit.

It is the duty of the clerk to enter into an examination of all the items charged, whether they be objected to or not, and all charges for disbursements unnecessarily incurred should be stricken out by him. *Belding v. Conklin*, 4 How. 196. See *Stimson v. Huggins*, 16 Barb. 658, 662; S. C., 9 How. 90. Under the more liberal allowances of the former fee-bill, when greater scope was afforded for excessive charges than under the present practice, the proper rule to be observed by the taxing officer was to reject a charge if he entertained any doubts as to its correctness (*Rogers v. Rogers*, 2 Paige, 458); but this rule would seem to be too stringent to be strictly applicable to allowances under the Code.

b. Bill of costs. The items of disbursements, claimed by the successful party in his costs, must be stated in detail in his bill of costs; and it is not sufficient that they merely appear in the affidavit verifying the bill. *Shannon v. Brower*, 2 Abb. 377; overruling *Hager v. Danforth*, 8 How. 448. No distinction is made between fees of witnesses and other disbursements, and the bill of costs should therefore contain separate statements of the names of the witnesses, and the number of miles traveled by each, if travel fees are charged. *Shannon v. Brown*, 2 Abb. 377.

c. The affidavit. The provisions of section 311 of the Code require the bill of costs to be verified as to the disbursements charged, by affidavit (Code, § 311, subd. 1), which is usually made by the attorney for the successful party. It is not essential, however, that the affidavit should be made either by the party or his attorney, but it is sufficient, if made by any third person acquainted with the facts. *Willink v. Reckle*, 19 Wend. 82.

In cases where fees for the attendance of witnesses are charged, the affidavit must state:

1. The name and place of residence of each witness.
2. The distances they severally resided from the place of trial, according to the usually traveled route.
3. The number of miles they respectively traveled as such witnesses, according to the usually traveled route, for the purpose of going to the place of trial and returning therefrom.
4. The number of days the witnesses severally and actually attended the court as such witnesses.
5. That they were material and necessary witnesses, or, that the party believed them to be so. *Wheeler v. Lozee*, 12 How.

The affidavit.

446; *Toll v. Thomas*, 15 id. 315; *Haynes v. Mosher*, id. 216; *Hicks v. Brennan*, 10 Abb. 304; *Taack v. Schmidt*, 25 How. 340; *Bank of Niagara v. Austin*, 6 Wend. 548; *Willink v. Reckle*, 19 id. 82.

If any witness is subpoenaed at a temporary residence, that fact should also be stated in the affidavit (*Dowling v. Bush*, 6 How. 410; *Clarks v. Staring*, 4 id. 243; *Wheeler v. Lozee*, 12 id. 446), as he is entitled, in such case, to fees for traveling from that place, whether the distance is greater or less than from his permanent residence (*Clarks v. Staring*, 4 How. 243; *Dowling v. Bush*, 6 id. 410; *Bank of Niagara v. Austin*, 6 Wend. 548), unless he was about to return home when subpoenaed, and remains solely for the purpose of attending as a witness when required on a future day, or does in good faith return home previous to the trial. *Pike v. Nash*, 16 How. 53. Where increased travel fees are claimed on this account, the necessity of subpoenaing the witnesses away from home must be clearly shown. See *Mead v. Mallory*, 27 How. 32.

If fees are claimed by a party for a witness who was not subpoenaed, the affidavit must state that he attended at the request of the party as his witness, solely for the purpose of being a witness, and that otherwise he would not have attended. *Wheeler v. Lozee*, 12 How. 446; *Taaks v. Schmidt*, 25 id. 340.

If a witness was not sworn, that fact furnishes presumptive evidence that he was not necessary, and the clerk cannot tax fees for his attendance, unless it be shown why he was not sworn, and how it happened that the party was able to dispense with his testimony on the trial. *Haynes v. Mosher*, 15 How. 216; *Dean v. Williams*, 6 Hill, 376; *Toll v. Thomas*, 15 How. 315; *Mead v. Mallory*, 27 id. 32.

To authorize a charge for the attendance of the party himself as a witness, clear proof must be given that he attended solely as a witness, and in no respect as a party. *Van Dusen v. Bissell*, 29 How. 481; *Hanna v. Dexter*, 15 Abb. 135; *Bronner v. Frauenthal*, 12 id. 183; S. C., 20 How. 355; *Walker v. Russell*, 7 Abb. 452 (n.); S. C., 16 How. 91; *Logan v. Thomas*, 11 id. 160. See *Logan v. Brooks*, 8 Abb. 127; S. C., 17 How. 29; *Taaks v. Schmidt*, 25 id. 340; and see *Cornell v. Potter*, 15 id. 278; *Steere v. Miller*, 28 id. 366; S. C. affirmed, 30 id. 7.

Statement of costs and disbursements.

*Statement of costs and disbursements.**(Title of cause.)*

COSTS.	DISBURSEMENTS.
Costs before notice of trial..... \$ Costs after notice and before trial. Additional defendants served, Trial fee, issue of fact..... Trial fee, issue of law..... Allowance by statute..... Allowance by court..... Costs of motion for..... Trial occupied more than two days..... Appointment of guardian for in- fant defendant..... Examination of party before trial. Attending and taking deposition <i>de bene esse</i> Drawing interrogatories to annex to commission..... Making and serving case..... Making and serving amendments to case..... Making and serving case of more than 50 folios..... Term fees for following terms, viz:	Referee's fees..... \$ Commissioner's fees..... Clerk's trial fee, \$; do for en- tering judgment, \$ Paid for searches..... Paid for affidavits and acknowl- edgments as follows:
 Cost of motion for new trial, Spe- cial Term..... Proceedings before and after granting new trial..... Application for judgment on spe- cial verdict, before argument..... Application for judgment on spe- cial verdict for argument..... Appeal to General Term, before argument..... Appeal to General Term, for argu- ment..... term fees as follows:	 Serving summons and complaint, Paid referee settling case..... Certified copies orders as follows:
 Appeal to court of appeals, before argument..... Appeal to court of appeals for argument..... term fees as follows:	 Clerk's filing execution and en- tering satisfaction..... Transcript and filing..... Copy judgment for roll..... Postage incurred, \$; to be in- curred, \$..... Juror's fees..... Stenographer's fees copy..... Sheriff's fees on execution..... Sheriff's fees on attachment..... Sheriff's fees on terms as above..... Copy minutes..... For printing cases..... For printing points..... For remittitur..... For copies following papers:
 Preparing case on appeal to court of appeals..... Damages in court of appeals for delay..... Interest on verdict.....	 Witness' fees as per statement below.....
Disbursements as per next column,	
Total costs and disbursements..	

Witnesses' fees — Affidavit of disbursements.

Witnesses' Fees, _____ 18 .

NAMES.	RESIDENCE.	Miles from Court House.	Miles traveled.	Number of days attend'd.

The affidavit is usually appended to the bill of costs, and may be in the following form :

Affidavit of disbursements.

(Title of cause.)

(Venue.)

A. B., plaintiff's attorney [or managing clerk in the office of plaintiff's attorney, or otherwise], being duly sworn, says :

That all the foregoing disbursements have been or will be necessarily incurred in this action. [*If witness' fees are charged, add*] Deponent further says that C. D., E. F. and G. H. were severally necessarily subpoenaed and attended as witnesses on the part of the plaintiff (or defendant), in this action; and that they were severally and necessarily in attendance (five) days each on the trial of this action; that the said C. D. resides in the town of B., in this State, and traveled _____ miles from his place of residence to attend the trial of this action; and the said E. F. and G. H. each traveled _____ miles from the town of P., their residence, to attend the trial of this action.

[*Where there is a foreign witness, add:*] That K. L. resides in the town of _____, in the State of _____, and traveled from that town to the place of trial to attend said trial as a witness for the plaintiff [or defendant]; and that he was a material and necessary witness, and necessarily attended as such _____ days. That he came from his said residence to said place of trial by [The Boston and Albany railroad _____], which is the nearest usually-traveled route between said places; and that on said route he entered this State at _____, and traveled _____ miles therefrom to said place of trial.

(Jurat.)

(Signature.)

Form of notice of taxation or adjustment.

Take notice, that the within bill of costs will be presented to the clerk of the county of _____ for adjustment [and to have the amount inserted in the judgment entered herein], at his office in

 Objections—Appeal from adjustment—How waived.

the city of _____, on the _____ day of _____ inst., at _____ o'clock
 in the _____ noon.

(Date.)

(Signature.)

(Address.)

The affidavit need not be served, beforehand, on the opposite party; and merely presenting it to the clerk on the adjustment is sufficient. *Sleight v. Hancox*, 4 Abb. 245, 248.

d. Objections. Objections, on the adjustment, either to the form of the affidavit or to any items in the bill of costs, should be *specifically* raised, in order to afford an opportunity for correction. *Toll v. Thomas*, 15 How. 315; *Mooers v. Saunders*, 6 Ch. Sent. 75. Items which are never allowable may be objected to in general terms (*Wilder v. Wheeler*, 1 How. 136); but the objections to items allowable under the statutes must be shown. *Ib.*

Section 4. Appeal from adjustment.

a. In general. Although the Code makes no provision for an appeal from the decision of the clerk as regards costs, his acts in adjusting and settling their amount are not necessarily final and conclusive. The court has, as one of its incidental powers, the right to control the legal acts and compel a performance of the legal duties of all its inferior officers. The exercise of this power is peculiarly necessary in the formal and proper entry of a judgment. *Whipple v. Williams*, 4 How. 28. And an appeal, in substance, may be had from the decision of the clerk, by a motion to correct or set aside the adjustment. *Beattie v. Qua*, 15 Barb. 132; *Whipple v. Williams*, 4 How. 28. This motion must be made at special term. 3 Code R. 24.

An erroneous adjustment of the costs is not a sufficient ground for setting aside the judgment (*Toll v. Thomas*, 15 How. 315; *Henry v. Bow*, 20 id. 215); nor for an appeal from the judgment. *Beattie v. Qua*, 15 Barb. 132.

b. How waived. The motion for a re-adjustment of costs should be made promptly, at the first special term held specially for non-enumerated motions, or some reasonable excuse must be shown for the delay. *Collomb v. Caldwell*, 5 How. 336; S. C., 1 Code R. N. S. 41; *Dresser v. Wickes*, 2 Abb. 460. And by paying or receiving the costs without objection, the right of moving on the ground of an erroneous adjustment is waived. *Collomb v. Caldwell*, *supra*; *Day v. Beach*, 1 How. 236; *Schermerhorn*

What will be reviewed — The decision — Costs — Appeal.

v. *Van Voast*, 5 How. 548; S. C., 1 Code R. N. S. 400. See *Ford v. Monroe*, 6 How. 204; S. C., 10 N. Y. Leg. Obs. 155.

c. *What will be reviewed.* On a motion of this kind, no objections will be considered but such as are shown by affidavit to have been specifically taken before the clerk on the adjustment. *Toll v. Thomas*, 15 How. 315; *Cuyler v. Coats*, 10 id. 141; *Lyon v. Wilkes*, 1 Cow. 591; *People v. Oakes*, 1 How. 195; *Constantine v. Van Winkle*, 2 id. 273. And this affidavit must be served on the adverse party with notice of motion for a re-adjustment. *Webb v. Crosby*, 11 Paige, 193.

A party will not, ordinarily, be allowed to read new affidavits in support of the motion (*Logan v. Thomas*, 11 How. 160), unless for the purpose of setting up newly-discovered evidence (*Schermerhorn v. Van Voast*, 5 How. 458), or to show what occurred during the adjustment. *People v. Oakes*, 1 How. 195. And so a party opposing a judgment may show, by a new affidavit, that he was unable to attend it. *Whipple v. Williams*, 4 How. 28; *Goodyear v. Baird*, 11 id. 377.

The adjustment will not be reviewed, if the party objecting to it did not appear before the clerk, after due notice and service of a copy of the bill of costs. *Hinckley v. Boardman*, 3 Cai. 134.

d. *The decision.* Generally, so far as any error has been committed by the clerk, the adjustment will be set aside by the court, but a small disbursement at the legal rate, incurred in good faith, though technically unnecessary, will not be interfered with. *People v. Colborne*, 20 How. 378.

The adjustment, although regularly made, is sometimes set aside as a matter of favor by the court, but usually upon payment of costs. *Peck v. Wood*, 2 How. 172.

Where, on an appeal, an item of disbursements is stricken out as not being supported by the affidavit before the clerk, leave will not be granted to supply evidence of the disbursement without some excuse for its previous omission. *Ball v. Sprague*, 23 How. 241.

e. *Costs.* The costs of the motion, and of appeals from the order thereon, are governed by the same rules as in ordinary motions. See Code, § 315.

f. *Appeal.* On a denial of the motion at special term, an appeal lies to the general term. *Stuyter v. Smith*, 2 Bosw. 673. And, it seems, the decision of the latter may be reviewed on an

Costs in court of appeals.

appeal from the *judgment* to the court of appeals. See *Rathbone v. M'Connell*, 21 N. Y. (7 Smith) 466; affirming S. C., 20 Barb. 311.

g. Costs in court of appeals. The proper remedy, in the first instance, for the correction of errors in the adjustment of costs on an appeal to the court of appeals, is by motion in the court below as in other cases. *Dresser v. Brooks*, 4 How. 207; S. C., 2 Code R. 139; 2 N. Y. (2 Comst.) 559. An appeal may, however, be taken from the final decision of the court below to the court of appeals.

PART X.

JUDGMENT.

CHAPTER I.

PROCEEDINGS BEFORE ENTERING JUDGMENT.

ARTICLE I.

APPLICATION WHEN RELIEF DEMANDED.

Section 1. Application necessary in all cases where relief is demanded. In an action arising on contract to recover a money demand for a sum certain, judgment may be perfected on failure of the defendant to answer, without application to the court; but where the judgment sought to be entered up is for specific relief, or for unliquidated damages, or an unliquidated amount arising out of a demand on contract, application must in every case be made to the court, on the same proof of service and default as is necessary in case of an entry of judgment by the clerk. Code, § 246, subd. 1, 2; *Flynn v. The Hudson River R. Co.*, 6 How. 308; S. C., 10 N. Y. Leg. Obs. 158; *Trapp v. New York & Erie R. R. Co.*, 6 How. 237; S. C., 1 Code R. N. S. 384. By a rule of the supreme court it is expressly provided that "no judgment in an action for divorce shall be entered except upon the special direction of the court." Rule 92.

Section 2. Application, where made. The application must be made to the court (Code, § 246, subd. 2), and it must be made at a special and not at a general term. *Ryan v. McCannell*, 1 Code R. 93; S. C., 1 Sandf. 709. Nor will such application be entertained by a judge out of court, or even at chambers. *Aymar v. Chace*, 12 Barb. 301; S. C., 1 Code R. N. S. 330. See *Porter v. Lent*, 2 Abb. 115; S. C., 4 Duer, 671.

The application may be made at any special term in the district embracing the county in which the action is triable, or in an

Application, when made — Proceedings on application — In foreclosure.

adjoining county, or at the circuit in the county in which the action is triable. Sup. Ct. Rule 33.

As to the practice previous to the adoption of this rule in 1849, see *Warner v. Kenney*, 1 Code R. 76; S. C., 3 How. 323; *Anonymous*, 1 Code R. 82; *Ryan v. McCannell*, 1 id. 93; S. C., 1 Sandf. 709.

Section 3. Application, when made. The time to make application for the relief demanded in the complaint is after the expiration of the time for answering. Code, § 246, subd. 2.

Section 4. Notice of application. If the defendant has not appeared at all in the action the application is necessarily *ex parte*, and no notice of any kind is required; nor in any event is it necessary to place the cause on the calendar since there is, in fact, no issue. *Ante*, 5, 25. But if the defendant has given notice of appearance in the action before the expiration of the time for answering, he is then entitled to eight days' notice of the time and place of application. Code, § 246, subd. 2. And in such case if application be made *ex parte*, and without notice, the proceeding will be irregular. *Saltus v. Kip*, 2 Abb. 382; S. C., 12 How. 342; 5 Duer, 646.

Section 5. Proceedings on application.

a. In general. On this application, as in the case of an entry of judgment by the clerk, it is necessary to be prepared with proof of due and regular service of the summons, or of the summons and complaint, if served together, upon the defendant or defendants, against whom judgment is to be entered. See Code, § 246. The plaintiff must also be prepared with proof that no answer or demurrer has been received. The service of a demurrer by the defendant will be regarded as equivalent to an answer, within the meaning of this section (246) of the Code. See *Brodhead v. Brodhead*, 4 How. 308; S. C., 3 Code R. 8; *Kelly v. Downing*, 42 N. Y. (3 Hand) 71.

b. In foreclosure. In foreclosure actions, where no answer is put in by the defendant within the time allowed for that purpose; or there is no answer denying any material facts of the complaint, the plaintiff, after the cause is in readiness for trial as to all the defendants, may apply for judgment at any special term, upon due notice to such of the defendants as have appeared in the action, and without putting the cause on the calendar. And the plaintiff in such case, when he moves for judgment, must show, by affidavit or otherwise, whether any of the defendants who

In action for divorce — Relief in case of default.

have not appeared are absentees ; and if so he must produce the report as to the proof of the facts and circumstances stated in the complaint, and of the examination of the plaintiff or his agent, on oath, as to any payments which have been made. Rule 72, Sup. Ct.

And in all foreclosure cases the plaintiff, when he moves for judgment, must show by affidavit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action containing the names of the parties thereto, the object of the action and a description of the property in that county affected thereby, the date of the mortgage and the time and place of recording the same, has been filed at least twenty days before such application for judgment, and at or after the time of filing the complaint, as required by section 132 of the Code. *Ib.*

c. In action for divorce. The application, in a case of this nature, must be grounded on the summons and complaint and proof of service and default, and, if there be an answer, then upon that answer also. If the complaint does not contain the averments specially prescribed by rule 87 of the supreme court, or, if containing those averments, it is not duly verified, the plaintiff's affidavit stating such facts should also be produced. See Rule 87.

Where the suit is to annul the marriage under the circumstances specified in rule 88, an affidavit by the plaintiff, showing that the parties have not cohabited in the manner there stated, must also be tendered to the court. See Rule 88.

Section 6. What relief may be granted in case of default. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint. Code, § 275. And it is not sufficient that the plaintiff states facts sufficient to entitle him to the relief ; he must ask for it. *Simonsen v. Blake*, 12 Abb. 331 ; S. C., 20 How. 484. A judgment giving relief not so demanded, will be void as unauthorized. *Ib.* ; *Walton v. Walton*, 32 Barb. 203 ; S. C., 20 How. 347 ; *Hurd v. Leavenworth*, 1 Code R. N. S. 278 ; *Bullwinker v. Ryker*, 12 Abb. 311. So, in a suit on a mechanic's lien, judgment cannot be taken for a larger amount than that for which the lien has been effected. *Protection Union v. Nixon*, 1 E. D. Smith, 671. See Judgment by Default, *post*, where the subject of this section is fully treated.

What relief may be granted in case of answer—What is a special verdict.

Section 7. What relief may be granted in case of answer. Where the defendant answers, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. Code, § 275. This provision of the Code relieves a plaintiff from any technical objection that he has not prayed for the precise relief to which he may seem entitled on the trial; but the relief to be granted must still be consistent with the case made by the complaint. *Bradley v. Aldrich*, 40 N. Y. (1 Hand) 504. The plaintiff may be allowed any judgment to which, upon the allegations and proof, he is entitled, either at law or in equity. *New York Ice Co. v. North-western Ins. Co.*, 23 N. Y. (9 Smith) 357; S. C., 12 Abb. 414; 21 How. 296; *Jones v. Butler*, 30 Barb. 641; S. C., 20 How. 189; *See v. Partridge*, 2 Duer, 463; *Armitage v. Pulver*, 37 N. Y. (10 Tiff.) 494; S. C., 5 Trans App. 186.

A demurrer is not an answer within section 275 of the Code. *Kelly v. Downing*, 42 N. Y. (3 Hand) 71.

ARTICLE II.

APPLICATION ON SPECIAL VERDICT.

Section 1. What is a special verdict. The requisites of a special verdict, under the Code, are the same as they were prior to the Code (*Williams v. Willis*, 7 Abb. 90), and the following is the statutory definition of it: "A special verdict is that by which the jury find the facts only, leaving the judgment to the court." Code, § 260.

A special verdict should find facts, and not the mere evidence of facts, so as to present questions of law only to the court by which the judgment is to be directed, or by which that judgment, when entered, is to be reviewed. *Fuller v. Van Geesen*, 4 Hill, 171; *Birckhead v. Brown*, 5 id. 634; *Langley v. Warner*, 3 N. Y. (3 Comst.) 327; *Sisson v. Barrett*, 2 N. Y. (2 Comst.) 406; *Hill v. Corvell*, 1 N. Y. (1 Comst.) 522. And it should state all the facts, otherwise a new trial will be ordered. *Eisemann v. Swan*, 6 Bosw. 669. See *ante*, 195, 196.

In determining the questions arising on a special verdict, the court cannot legally deduce any fact, not derived from other facts, appearing in it. *Williams v. Jackson*, 5 Johns. 489, 502. But being brought up for adjudication, in connection with the plead

Where application on, must be made — Papers upon application.

ings, it is not necessary for the special verdict to contain any statement of facts admitted by them. *Barto v. Nimrod*, 8 N. Y. (4 Seld.) 483.

The report of a referee, where the reference is to report facts, has the effect of a special verdict under the provisions of section 272 of the Code, and should therefore be drawn and brought up for adjudication in the same manner; and the question arising on the facts thus found may be reviewed, on appeal, without exceptions. Code, § 272; *Kirby v. Fitzpatrick*, 18 N. Y. (4 Smith) 484; *Marshall v. Smith*, 20 N. Y. (6 Smith) 251. See *Swift v. Wylie*, 5 Rob. 680. And as to the merits, a case, for the purpose of reviewing the decision of a referee upon the whole issue, is in the nature of a special verdict. *Sturgis v. Merry*, 2 N. Y. (2 Comst.) 189; S. C., 3 How. 418.

Section 2. Where application on, must be made. Application for judgment upon a special verdict, when rendered, should be made in the first instance at special term. Code, § 265. See *Wilcox v. Hoch*, 62 Barb. 509. And this is the rule whether the verdict is wholly or only in part special. *Gilbert v. Beach*, 16 N. Y. (2 Smith) 606.

Section 3. On what notice. The application is an enumerated motion (Sup. Ct. Rule 47), and the usual eight days' notice of motion must be regularly served on the opposite party, for the first day of the term. Rule 49, Sup. Ct.

Section 4. Placing cause upon calendar. The cause is put upon the calendar in the usual manner. The note of issue ought to show the nature of the proceeding and of the application, so that the clerk may put it in its proper place and order on the calendar.

Section 5. Papers upon application. The plaintiff is required to furnish the defendant, eight days before the argument, with a copy of the special verdict, and also to furnish the court with a copy, upon opening the argument, and also with a copy of the pleadings. Sup. Ct. Rule 49. In case he neglects to furnish the necessary papers in due time, the adverse party may move, on affidavit and notice, that the cause be stricken from the calendar, and that judgment be rendered in his favor. *Ib.*

Section 6. Proceedings on decision. The decision, when pronounced, should be entered and served as an order, by the prevailing party, who will proceed to enter his judgment upon the order in the usual manner.

Application for judgment non-obstante veredicto — Motion in arrest of judgment.

Section 7. Application for judgment non-obstante veredicto. Under the former practice, if a defense was put upon the record by plea, which was not a legal defense to the action, and the defendant had a verdict, the court, on motion, would give the plaintiff leave to sign judgment notwithstanding the verdict, provided the merits were deemed to be very clear. *Whittemore v. Adams*, 2 Cow. 626; *Grah. Pr.* 647.

The motion was an enumerated one, and was founded on the record, and would not be heard on affidavits. *Ib.*; *Soper v. Soper*, 5 Wend. 112; *Smith v. Smith*, 2 id. 624.

Under the present practice it has been held that, if the counter-claim spread upon the record is not a legal defense to the action, according to the provisions of the Code—or, in other words, consists of facts which are insufficient to bar a recovery by the plaintiff or to affect the amount of such recovery—then the plaintiff should have judgment, notwithstanding the allegations of fact constituting it are admitted to be true by a failure to reply to them, or on being put in issue are found by a jury in favor of the defendant. *Van Valen v. Lapham*, 13 How. 240; S. C. affirmed, 5 Duer, 689.

Application for a judgment *non-obstante veredicto* may now be made to the judge who tries the action, and there is no necessity to move before any other judge. *Ib.*

Section 8. Motion in arrest of judgment. Formerly, upon application to the court, an arrest of judgment might be obtained for any matter intrinsic, appearing upon the face of the record, amounting to a defect not amendable, or aided at common law or by statute, and for which a writ of error would lie. *Newball v. Adams*, 8 Taunt. 335; *Grah. Pr.* 641.

It is questioned whether a motion in arrest of judgment may be made under the Code (See *Snell v. Snell*, 3 Abb. 426; *Duel v. Agan*, 1 Code R. 134; but see *Noxon v. Bentley*, 7 How. 316), where it is strongly intimated that such a motion may still be made. It would seem that if the motion can be entertained at all, it can only be heard at a general term; such being the case under the practice immediately preceding the Code. See Old Sup. Ct. Rule 49; *Duel v. Agan*, 1 Code R. 134.

When verdict subject to opinion can be given.

ARTICLE III.

APPLICATION ON VERDICT SUBJECT TO OPINION.

Section 1. When such verdict can be given. The practice, as regards a verdict subject to the opinion of the court, is regulated by the two hundred and sixty-fifth section of the Code, which provides that: "When, upon a trial, the case presents only questions of law, the judge may direct a verdict, subject to the opinion of the court, at the general term."

The general term is the only tribunal to which such a verdict can be sent for final disposition. The court has no power to direct a verdict subject to a reference. *Buchanan v. Cheseborough*, 5 Duer, 238. A verdict of this nature must, upon its face, show an undisputed state of facts, involving only questions of law, so as to present nothing for consideration but the proper judgment to be rendered. The general term has no right of itself to deduce facts from disputed or uncertain evidence. *Wilcox v. Hoch*, 62 Barb. 509; *Dickerson v. Wason*, 48 id. 412; *Gilbert v. Beach*, 16 N. Y. (2 Smith) 606; *Cobb v. Cornish*, id. 602; S. C., 6 Abb. 129; 15 How. 407. Exceptions on either side to the reception or rejection of evidence are not the questions of law intended by the Code, and, if there are any such exceptions, a verdict of the kind under consideration cannot be ordered. *Bell v. Shibley*, 33 Barb. 610; *Beebe v. Ayres*, 28 id. 275; *Havemeyer v. Cunningham*, 8 Abb. 1; *Bangs v. Palmer*, 16 How. 542; *Sackett v. Spencer*, 29 Barb. 180; *Mason v. Breslin*, 9 Abb. N. S. 427; S. C., 40 How. 436; 2 Sweeny, 386; *Purchase v. Matteson*, 25 N. Y. (11 Smith) 211; S. C., 25 How. 161; 15 Abb. 402.

Where the cause is tried by the court without a jury, judgment cannot be directed subject to the opinion of the general term, the practice being applicable only in cases of trial by jury. *Malloy v. Wood*, 3 Abb. 369; S. C., 14 How. 67; 6 Duer, 657. See *ante*, 198, 199.

The time when the court must decide as to whether the case presents only legal questions, so as to warrant a verdict of this kind, is clearly before the case is submitted to the jury. The verdict in such case is the act of the court, and no discretion in the matter is given to the jury. They must obey the instruction of the court. After a verdict is rendered the court cannot then

Effect of such verdict—Application, where made—Case and points.

order the verdict found to be taken subject to the opinion of the general term; for, if such a course could be pursued, then, in every case, a verdict could be thus taken. *Wilcox v. Hoch*, 62 Barb. 509.

Section 2. Effect of such verdict. The verdict which the court is authorized to direct is a general one for the plaintiff or for the defendant, and it is quite immaterial in whose favor it is rendered. The only effect of rendering the verdict in favor of a party is that it devolves on him to prepare the case upon which the general term is to render judgment. *Cobb v. Cornish*, 16 N. Y. (2 Smith) 602; 6 Abb. 129; 15 How. 407; *Mason v. Breslin*, 40 How. 436; 8. C., 9 Abb. N. S. 427; 2 Sweeny, 386.

The entry of judgment is suspended by such a verdict, until the decision at general term. *Ib.*; *Roosa v. Snyder*, 12 How. 285; *Jackson v. Fitzsimmons*, 6 Wend. 546. See *ante*, 198, 200.

Section 3. Application, where made. The application for judgment must be made at general term (Code, § 265); and upon such application the question to be decided is never whether a new trial shall be granted, but which party, upon the conceded state of facts, shall have *final* judgment. *Mason v. Breslin*, 40 How. 436; 9 Abb. N. S. 427; 2 Sweeny, 386; *Cobb v. Cornish*, 16 N. Y. (2 Smith) 604; 6 Abb. 129; 15 How. 407. See *ante*, 198.

Section 4. Papers necessary on application. All the papers necessary on the application should be furnished by the party in whose favor the verdict is nominally recorded. *Ib.* And, being a calendar cause, the papers should be printed, and points made and served as upon an appeal. See Sup. Ct. Rules 50, 52.

Section 5. Case and points. It is the duty of the party, in whose favor the verdict is rendered, to prepare a case in the manner and subject to the rules of a case made upon a motion for a new trial. And it is required to be settled and filed in like manner, and printed in the mode required as to papers on an appeal from a judgment. See Sup. Ct. Rule 52. As to the mode of preparing, settling and filing the case, see *ante*, 424 to 431.

Section 6. Note of issue. A note of issue is required to be filed eight days before the commencement of the court at which the cause may be noticed. See Sup. Ct. Rule 48.

Section 7. Notice of motion. The case, when ready, must be set down for argument on the general term calendar, and notice of the motion for judgment served in the usual manner upon the opposite party.

What questions considered on the hearing — What judgment may be given.

Section 8. What questions considered on the hearing. On a verdict subject to the opinion of the court the question is, which party is entitled to judgment upon the facts established, and unless the objection has been taken at the trial the verdict may be supported on any theory consistent with the facts, though not suggested by the pleadings (*The Oneida Bank v. Ontario Bank*, 21 N. Y. [7 Smith] 490), and the court will draw, in support of the verdict, every inference from the evidence which a jury would be justified in drawing. *Williams v. Ins. Co. of North America*, 1 Hilt. 345. So if right on the merits the verdict may stand, though technically it should have been given the other way. *McConihe v. New York & Erie R. R. Co.*, 20 N. Y. (6 Smith) 495.

Section 9. What judgment may be given. Upon a verdict subject to the opinion of the court the question is never whether a new trial shall be granted, but which party, upon a conceded state of facts, shall have *final* judgment. *Cobb v. Cornish*, 16 N. Y. (2 Smith) 602; 6 Abb. 129; 15 How. 407. See *ante*, 201.

Judgment may be rendered either for the plaintiff or for the dismissal of the complaint. *Chittenden v. Empire Stone Dressing Co.*, 3 Abb. 71; S. O., 6 Duer, 30; *Kelley v. Upton*, 12 How. 140.

Section 10. Proceedings on judgment. The decision should be entered as an order of the general term, served in the usual manner; and thereupon judgment may be regularly perfected.

Taking a verdict subject to the opinion of the court upon the law is a procedure which has virtually superseded the practice of moving for a nonsuit, notwithstanding verdict rendered, though such a motion is perhaps still admissible. See *Downing v. Mann*, 3 E. D. Smith, 36; 9 How. 204.

Section 11. Appeal. Every judgment rendered upon a verdict taken subject to the opinion of the court at a general term may be reviewed by the court of appeals in the same manner and with the like effect as if exceptions had been duly taken at the proper time; provided it shall appear by the return that questions of law were involved in the rendition of the judgment. Code, § 265.

On this appeal to the ultimate tribunal the appellant must be careful to comply with the provisions of section 338 of the Code, and have the questions or conclusions of law decided at general term, together with a concise statement of the facts upon which they arose prepared and settled under the direction of the court below, as it is upon such statement that the review must take

Application on matters or points reserved.

place. See Code, § 333. The statement should be prepared and served in the same manner, and the same line of practice should be pursued generally as on the settlement of a case or exceptions in the ordinary mode. See subject of Appeals.

ARTICLE IV.

APPLICATION ON MATTERS OR POINTS RESERVED.

Section 1. When order may be made reserving cause for argument or further consideration. Under the provisions of section 264 of the Code the judge before whom the action is tried may, after the verdict is rendered, direct the cause to be reserved for argument or further consideration; but this power is now but rarely exercised, there being other means of correcting errors more expeditious and satisfactory. The practice was more peculiarly applicable to the state of the Code prior to 1851, under the provisions of which a judgment became final after four days unless a direction of this description was made. See *Stilwell v. Staples*, 4 Rob. 639; *Ball v. Syracuse & Utica R. R. Co.*, 6 How. 198; 1 Code R. N. S. 410; *Tracey v. Altmeyer*, 46 N. Y. (1 Sick.) 598.

If difficult questions have arisen on the trial, or if there exists some doubt as to the proper form of judgment to be rendered on the verdict (see Code, § 262), an order reserving the cause for argument on that point may be convenient, and to such a case the practice under consideration seems more peculiarly applicable, under the provisions of the Code as they now stand.

The judge, likewise, has power to reserve the cause for consideration without hearing further argument, and after such consideration must direct the clerk to enter judgment in accordance with his decision. See Code, § 264.

A case, when prepared, on a cause reserved for argument or further consideration under this section of the Code, must be settled in the same manner as a special verdict. Sup. Ct. Rule 41. See *ante*, art. 2, p. 195 to 197.

Section 2. Application for judgment, where made. Application for judgment, on a case reserved for argument or further consideration, must in the first instance be heard and decided at the circuit or special term; except that, when exceptions are taken, the judge trying the cause may, at the trial, direct them

Application for special order or decree.

to be heard in the first instance at the general term, and the judgment in the mean time suspended; and in that case they must be there heard in the first instance, and judgment there given. Code, § 265. But it is only the exceptions that can thus be ordered to be heard at the general term. If there are questions of fact to be examined, a judge at the circuit has no power to direct a case to be heard at general term. So far as relates to such questions of fact, they are heard on a motion for a new trial. *Dickerson v. Wason*, 48 Barb. 412; *Cronk v. Canfield*, 31 id. 171. See *Hotchkiss v. Hodge*, 38 Barb. 117; *Crouch v. Parker*, 40 id. 94.

ARTICLE V.

APPLICATION FOR SPECIAL ORDER OR DECREE.

Section 1. When application for special order or decree necessary. Every direction of a court or judge, made or entered in writing and not included in a judgment, is, by the Code, denominated an order. § 400. By the term "judgment," in this section of the Code, is to be undoubtedly understood *final* judgment, or a judgment corresponding with the former *final* decree in chancery, as contradistinguished from an *interlocutory* decree, pronounced merely for the purpose of ascertaining matter of law or fact preparatory to a final decree. Such interlocutory decree is, under the above definition of the Code, an *order*, and such it has been held to be for the purposes of an appeal. *Harris v. Clark*, 4 How. 78; S. C., 2 Code R. 47; *Cruger v. Douglas*, 2 N. Y. (2 Comst.) 571; 4 How. 215; 2 Code R. 119; *Belmont v. Ponvert*, 3 Rob. 693; *Hollister Bank of Buffalo v. Vail*, 15 N. Y. (1 Smith) 593; *Beebe v. Griffing*, 6 N. Y. (2 Seld.) 465; *Clark v. Brooks*, 2 Abb. N. S. 385, 405; S. C., 2 Daly, 159. See *Wood v. Mayor, etc., of New York*, 4 Abb. N. S. 152; *Morris v. Morange*, id. 447; S. C., 6 Trans. App. 1; 39 N. Y. (11 Tiff.) 172.

The cases in which an order of this kind becomes necessary, and the proceedings thereon, have been fully stated in the chapter relating to interlocutory or decretal orders. See ch. 6, p. 338; see, also, Rules 72, 87, Sup. Ct.

Under the former practice in chancery, orders were either common or special, or by consent; but the last two only seem to have a place in our present practice. Common orders were such as a party was entitled to of course, by the rules and practice of the

 Application, where and when made.

court, without showing special cause and without notice to the adverse party. 2 Barb. Ch. Pr. 581.

It is said that orders by consent, which include those founded upon the written stipulation or consent of the parties or their attorneys, are now entered as common orders formerly were, without application to the court. 1 Van Santv. Eq. Pr. 449. But no private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, are binding unless they have been reduced to the form of an order by consent, and entered, or unless the evidence thereof is in writing, subscribed by the party against whom the same is alleged, or by his attorney or counsel. Sup. Ct. Rule 16.

Special orders are such as are made on special application to the court, and are either *ex parte*, or upon notice to the opposite party. As belonging to the former class may be enumerated, an order for a *ne exeat*; to show cause why an injunction should not issue; for the appointment of a guardian *ad litem*; to enlarge the time to answer or reply, or to make a case or exceptions; an order of reference in a foreclosure suit; or any other preliminary order, before final judgment, where there is no answer or appearance of any defendant. See 2 Barb. Ch. Pr. 587; 1 Van Santv. Eq. Pr. 426. To these may be added, an order to file pleadings in a cause (Code, § 416); or to remove a mere technical difficulty by which other parties cannot be affected (*In re Patterson*, 4 How. 34), and many others. See Motions and Orders.

Special orders upon notice to the opposite party include all in which notice is requisite upon the application; and such notice is required to be served on the opposite party. See Motions and Orders.

Section 2. Application, where and when made. *Ex parte* applications in actions in the supreme court may be made to any judge of the court in any part of the State, and they may also be made to the county judge of the county where the action is triable, or in which the attorney for the moving party resides, except to stay proceedings after verdict. Code, § 401, subd. 3.

Application upon notice must be made to the court, either at a general or special term, in all the judicial districts but the first. *Bedell v. Powell*, 3 Code R. 61. In that district application may be made to a judge or justice out of court, except in the single case of an application for a new trial on the merits. Code, § 401, subd. 2. But an order made at chambers, in the

Procuring and settling order.

first district, is always regarded as made during a term of the court, as a special term is always held during the hours of attending at chambers. *Main v. Pope*, 16 How. 271. The application must be made within the district in which the action is triable, or in a county adjoining that in which it is triable; except that when the action is triable in the first judicial district, application must be made therein. In an action triable elsewhere, an application upon notice cannot be made in the first judicial district. Code, § 401, subd. 4.

The terms "county where the action is triable," as used in the above provision of section 401 of the Code, mean nothing more nor less than the *place of trial*, or the county named in the complaint as the place of trial (*Chubbuck v. Morrison*, 6 How. 367; *Gould v. Chapin*, 4 id. 185; 2 Code R. 107; *Bangs v. Selden*, 13 How. 163, 374; *Askins v. Hearn*, 3 Abb. 184), and must not be understood to include any county to which the defendant may have the right to transfer the cause, although such a construction has been in a few cases suggested. See *Peebles v. Rogers*, 5 How. 208; 3 Code R. 213; *Whitehouse v. Tilley*, MS. (not reported).

As to the time *when* application should be made, see chapter on Motions and Orders.

Section 3. Procuring and settling order. Neither party can have any benefit from a decision of the court, until the order thereon is drawn up and perfected. *Whitney v. Belden*, 4 Paige, 140; *Earl of Fingal v. Blake*, 2 Molloy, 50. An interlocutory decision of the court, upon a trial of a question of fact, is not an order, though it should properly contain all the elements on which an order in form directing the reference or further proceeding may be founded. See *Otis v. Spencer*, 16 N. Y. (2 Smith) 610; S. C., 15 How. 425; 6 Abb. 127. And the proper practice in such case is, on filing the written decision of the judge, to draw and enter an order, following the terms of the decision, and appointing and naming the referee and specifying and directing the subject of the reference. The order should be drawn in the form of the former interlocutory or decretal order. See 1 Van Santv. Eq. Pr. 520.

An *ex parte* order is drawn up by the party who applies for it, whether such application be made to the court or to a judge at chambers; and the judge will modify the order, or such modifications of it will be directed as the court may deem proper. An order to show cause, being a mere notice, is generally allowed

Form of order.

in the precise form the party making application desires. On the return of such order, the order absolute thereon, if granted, is to be drawn, settled and entered as other orders allowed on litigated motions. See 1 Van Santv. Eq. Pr. 449. Where the order is special in its provisions, the party entitled to draw up the same should submit a copy thereof to the opposite party in order that he may propose amendments to it if he think proper. Under the former practice, the draft order and the amendments proposed, if any, were submitted to the register to be settled by him and entered. *Whitney v. Belden*, 4 Paige, 140. But under the present practice, in case of any misunderstanding or question in regard to the terms of the order, the same should be submitted for settlement to the judge who made it; and if the parties cannot otherwise agree, the order may be noticed for settlement, on the usual notice, before the judge at chambers. 1 Van Santv. Eq. Pr. 450. Or the successful party may enter, without notice, such order as from the minutes of the judge, he conceives himself entitled to, but he does this at the risk of having the same set aside for irregularity, or corrected on motion for embracing other or different relief from that given him by the actual decision. *Ib.*

The order may be drawn by the judge granting it, if he thinks proper, or he may even adopt that previously drawn and furnished him by the party making application, and indorse his *allocatur*, or allowance upon it; and in such case it may be entered and served without further settlement or notice to the adverse party. See 1 Van Santv. Eq. Pr. 450; 1 Barb. Ch. Pr. 584; *Whitney v. Belden*, 4 Paige, 140.

Section 4. Form of order. Where the order is made by a judge at chambers, the title of the cause only is set forth, and the order follows, to which is affixed the signature of the judge. No caption of the order is necessary; but if a chamber order has a caption, as though it was made at a special term, and be signed by the judge, it is not for that reason irregular or imperfect, and it detracts nothing from the force of the order. *Dresser v. Van Pelt*, 15 How. 19; S. C., 6 Duer, 687; *Matter of Knickerbocker Bank*, 19 Barb. 602; *Caldwell's Case*, 13 Abb. 405; S. C., 35 Barb. 444. So in the first judicial district, where motions except for a new trial on the merits may be made out of court, the fact that an order which elsewhere must be made by the court, is made as a chamber order, does not render it invalid. *Disbrow v. Folger*, 5 Abb. 53.

Form of order.

When made as orders of the court in term, the caption is usually of the term at which the motion was made, and of the form usual to chancery orders. Thus: "At a special (*or general*) term of the supreme court, held for the State of New York, at the court-house in the city of _____, on the _____ day of _____
 "Present—Hon. J. P."

Although the caption is usually of the term at which the motion is made, it seems that according to the former practice it may be of the term at which the decision was pronounced; or it may even be made to correspond with the time of the actual entry of the order; and where a party enters the order as of the time the decision of the court was pronounced, he cannot afterward object that it was not actually entered at that time. *Whitney v. Belden*, 4 Paige, 140.

The delay of the court in announcing its decision will not be allowed to operate to the prejudice of the party in whose favor the decision is made; and, where its decision of a motion is delayed, it must give effect to the decision as of the time when the motion was made. Any proceedings taken after the making of the motion, and before the decision is announced, will be at the peril of having them set aside in case they conflict with the decision. *Willson v. Henderson*, 15 How. 90. See *Crawford v. Wilson*, 4 Barb. 504, 524; *Bowman v. Tullman*, 3 Rob. 633.

The caption is followed by the title of the cause, in which the names of all the parties, plaintiffs and defendants, are set forth at length.

Where the order is made upon an application not in an action, instead of the names of the parties the following words should be used: "In the matter of the application of A. B.," etc.

The order for the revival of a cause should be entitled as in the original cause at the time of the abatement; but all subsequent orders and proceedings must be entitled in the cause as revived. *Rogers v. Paterson*, 4 Paige, 450.

The title of the cause in the order is succeeded by a brief reference to the papers upon which it is founded, and concludes with the ordering part, which contains the directions of the court upon the matter of the application. In drawing orders made upon motion, brevity should be studied, so far as may be consistent with a statement expressing the grounds upon which the order is made, and showing that its entry is regular. 1 Barb. Ch. Pr. 587.

ARTICLE VI.

APPLICATION FOR SETTLEMENT OF DECREE.

Section 1. Application, where made. The manner of settling a decree or final judgment, so nearly resembles that of settling an order made at special term, that what has been already said in reference to the latter (*ante*, 570, art. 4, § 3) will be fully applicable, and need only be here referred to.

Section 2. Making draft and amendments. The draft of the proposed judgment should be prepared by the successful party, and submitted by him to the opposite attorney, and, unless the same is agreed to in form, he should serve him with a copy, together with notice of the settlement thereof before the judge rendering the decision at his chambers. The adverse party may then propose amendments, on his part, and attend at the time and place of settlement. See 1 Van Santv. Eq. Pr. 586; 1 Barb. Ch. Pr. 340.

Section 3. Settlement by judge. The judgment may be either settled on the spot, or, on the other hand, the judge may retain the papers, and settle it at some subsequent time at his leisure. *Ib.*

Section 4. Re-settlement. If either party be dissatisfied with such settlement, it is competent for him to again bring the question before the judge on an application for re-settlement, on giving notice to the opposite party. If, on such re-settlement, the judge still persists in the view claimed to be erroneous, no further remedy exists, except by means of an appeal.

Where a defendant has appeared in the action, the plaintiff cannot settle, *ex parte*, the form of the judgment to be entered, if it grant him special relief. The defendant is entitled to notice of the application to settle the judgment, and if the plaintiff proceed to enter the same, without settlement on notice, it will be at the peril of having it set aside, on motion, for such irregularity. *Wood v. Lambert*, 1 Code R. N. S. 214; S. C., 3 Sandf. 724.

ARTICLE VII.

REFERENCE TO ASCERTAIN FACTS.

Section 1. In what cases necessary. The cases in which a proceeding in the nature of a preliminary reference to ascertain

facts becomes necessary, are in actions for foreclosure, partition or divorce, prior to the final motion for judgment for failure to answer. See *ante*, 338, ch. 6.

Section 2. In foreclosure.

a. What matters referred in foreclosure. The nature and terms of such a reference in foreclosure are specially pointed out by the seventy-second rule of the supreme court, and may be ordered either when the defendant fails to answer at all, or when the right of the plaintiff, as stated in the complaint, is admitted by the answer.

The object of the reference is to ascertain the amount due to the plaintiff and to such of the defendants as are prior incumbrancers of the mortgaged premises, and also as to whether the mortgaged premises can be sold in parcels if the whole amount secured by the mortgage has not become due. In case the defendant is an infant and has put in a general answer by his guardian, or if any of the defendants are absentees, the order of reference must direct the person to whom it is referred to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath as to any payments which have been made, and to compute the amount due on the mortgage. Rule 72, Sup. Ct.

b. Motion for reference, how made. In case none of the defendants appear the application is made *ex parte*; but where they have appeared the motion must be upon due notice. Sup. Ct. Rule 72. Usually the application for judgment will be sufficient without a formal notice of motion, but it is, of course, always competent to bring the application on as an independent motion if desired. See *Kelly v. Searing*, 4 Abb. 354.

c. Affidavit. The application is founded upon the summons and complaint, proof of due service of the former on all the defendants, and if any answer has been put in, upon that answer also. The necessary affidavit or the certificate of the clerk, required by the seventy-second rule, showing that a notice of the pendency of the action, etc., has been filed, should also be in readiness.

And on this motion the affidavit should show, in addition to the fact that the defendant has failed to answer the complaint, or has by answer expressly admitted the right of the plaintiff as stated in the complaint, the further fact whether the moneys secured by mortgage have all become due and payable or not,

Order of reference — Proceedings on reference.

and also whether any of the defendants are absentees or infants. *Anonymous*, 3 How. 158. See Sup. Ct. Rule 72.

d. Order of reference. Where the whole amount is due and none of the defendants are infants or absentees, the order will direct simply a computation of the amount due to the plaintiff and to the defendants who are prior incumbrancers of the mortgaged premises, if any. In case the whole amount is not due, an inquiry as to whether the mortgaged premises can be sold in parcels must be added. Rule 72, *supra*.

If any of the defendants are infants or absentees the order, besides providing for a computation, must further direct proof of the plaintiff's allegations to be taken, and also that the plaintiff or his agent be examined on oath as to any payments which have been made. *Ib*.

Where no answer has been put in by an *absent* defendant, the order of reference should always direct the referee to take proof of the facts and circumstances set forth in the complaint, and also to report the proof and examinations had before him. *Wolcott v. Weaver*, 3 How. 159.

The reference is usually made to the clerk, but it may be made to any other suitable person. See Sup. Ct. Rule 72.

An order of reference as against defendants in default cannot be combined with a reference of the whole issue as to others who contest the plaintiff's rights. They are separate proceedings, and if joined in the same order the report will stand as to the contesting defendants, but will be irregular as to the defaulting one, who may claim a separate reference to compute. *Cram v. Bradford*, 4 Abb. 193. On the coming in of the report, however, on the whole issue, the proceedings may then be regularly perfected by taking a supplementary report of this nature as against the parties in default. *Hill v. McReynolds*, 30 Barb. 488.

e. Proceedings on reference. The proceedings on a reference of the kind under consideration have been fully described in the chapter which treats of interlocutory or decretal orders (see *ante*, ch. 6), and it is only necessary to state here, generally, that where the reference is merely to compute, and none of the defendants appear, the usual course is to proceed immediately, give the formal proof, and complete the report at once. And so it has been held that such reference may be immediately proceeded with, even when the defendant appears, but makes default in answering; especially where he has not in any man-

Report and confirmation — In partition.

ner been misled or surprised, or deprived of any credit to which he was entitled on the computation, or of any other substantial right. *Kelly v. Searing*, 4 Abb. 354.

When the reference embraces the other matters prescribed by the rule (72) the proceeding may occupy more time, but being *ex parte*, no formal notice to the opposite party is necessary. It is, however, competent for the opposite party to appear, and he may object as to any of the matters of proof tendered, or may claim to be heard as to any provision to be made as to the sale of the mortgaged premises in parcels, if applicable.

The referee is limited in his examination to the subjects specified in the order, and is bound to pursue the directions of the decree under which he acts. *McCrackan v. Valentine's Ex'rs*, 9 N. Y. (5 Seld.) 42.

f. Report and confirmation. Upon the coming in of the report, nothing but a simple order of confirmation is necessary. The report is to be produced and used upon the further application for judgment. See *Swarthout v. Curtis*, 5 How. 198; S. C., 4 N. Y. (4 Comst.) 415; 3 Code R. 215.

g. Application for judgment. As to proceedings upon application for judgment, see *ante*, art. 1, § 5; see, also, Sup. Ct. Rule 72.

Section 3. In partition.

a. What matters referred in partition. A similar preliminary reference to ascertain facts, in cases of partition, is frequently necessary where the rights and interests of the several parties, as stated in the complaint, are not denied or controverted, and where any of the defendants are infants, or absentees, or unknown. Sup. Ct. Rule 79.

b. Motion, where and how made. The application for the order of reference, which is regulated by rules 79 and 80, must be made at special term, and on notice to such of the parties as have appeared. Where none of the parties have so appeared the application will be *ex parte*. It should be founded on the summons, the pleadings, and proof of service on such of the parties as have not appeared.

c. Affidavit. It is requisite that an affidavit be also made, bringing the case within the terms of rule 79, and embracing the subject-matter of the reference.

d. Order for reference. The order of reference, in all cases, makes provision for taking proof of the plaintiff's title and

Proceedings upon reference — Application for judgment.

interest in the premises, and of the several matters set forth in the complaint, and to ascertain and report the rights and interests of the several parties in the premises, and also an abstract of the conveyances by which the same are held. Rule 79.

When a sale is desirable, the plaintiff, upon stating the fact in the affidavit which is filed for the purpose of obtaining the order of reference, may also comprise in the reference an inquiry upon that subject, and likewise as to the existence of any liens on the premises as to which provision should be made on a decree for sale, if a sale is adjudged necessary. Rule 80, Sup. Ct.

e. Proceedings upon reference. The proceedings upon the reference in partition should be in the ordinary form, on the usual notice to such of the parties as have appeared, or waiver of such notice. If none have appeared the proceeding will be *ex parte*, and, of course, no notice will be necessary. The same evidence of the matters to be inquired into must be submitted to the referee, by the plaintiff, as would be requisite on a trial by the court. He must also prepare and hand in a proper abstract, with all necessary official searches, and must otherwise satisfy all the requirements of the rules. See Sup. Ct. Rules 79, 80.

f. Report. The report of the referee, when any of the parties have appeared, should be filed in the office of the clerk, as prescribed by rule 39, and serves as the foundation of the application to the court for the requisite decree.

Where the report of the referee states the fact explicitly that he had caused the necessary searches to be made, and certifies what incumbrances, etc., there are, it is sufficient without annexing to the report a search for mortgages or conveyances, etc. *Noble v. Cromwell*, 27 How. 289; S. C., 26 Barb. 475; 6 Abb. 59. See, also, *Hamilton v. Morris*, 7 Paige, 39, and 2 R. S. 321 (330), § 23; *id.* 330 (340), § 81.

g. Application for judgment. In a case where all the defendants are known, and none of them are infants or absentees, a preliminary reference such as described need not be obtained before moving for judgment on the usual proofs of a default suffered. See *Brownson v. Gifford*, 8 How. 389. Proof of the interests of other parties and an abstract of the title must, however, be in readiness, and must be tendered to the court, and it may then be taken, either in open court or on a reference to the clerk for that purpose. See 2 R. S. 321 (330), §§ 22, 23; *Porter v. Lee*, 6 How. 491; *Ripple v. Gilborn*, 8 *id.* 456. It is unneces-

In action for divorce — On what papers — Order and proceedings on reference.

sary to make a formal entry of default. *Watson v. Brigham*, 1 Code R. 67; S. C., 3 How. 290.

See further as to application for judgment, *ante*, 561, art. 1.

Section 4. In action for divorce.

a. What matters referred in divorce suit. A preliminary reference in cases of this nature may be obtained where the defendant fails to answer the complaint, or if the facts charged in the complaint are not denied in the answer. The object of the reference is to take proof of all the material facts charged in the complaint. Sup. Ct. Rule 87. If the complaint is defective the reference may be refused. *Heyde v. Heyde*, 4 Sandf. 692.

b. Application, how made. If the defendant fails to answer the complaint, application may be made *ex parte*. But where the facts charged are not denied in the answer, the order should be applied for on motion, and of course notice will be proper.

c. On what papers. The application is founded on the summons and complaint and proof of service and default; and if there be an answer, then upon the summons, complaint and answer. If the complaint does not contain the averments prescribed by rule 87, or if, containing those averments, it is not duly verified, the plaintiff's affidavit of such facts should also be in readiness. See Rule 87.

And where the suit is to annul a marriage under the circumstances detailed in rule 88, an affidavit denying cohabitation in the modes there specified must be also tendered to the court. See Rule 88.

d. Order of reference. The reference should be to take proof of all the material facts charged in the complaint. Rule 87. And as judgment in these cases cannot be rendered as of course upon the default of the defendant, nor without full proof of the plaintiff's case, it is imperative that the facts be obtained by a reference as above. See Rule 92.

It should be remembered that the species of reference now under consideration is only proper where there is a default in answering. In contested cases the order of reference should be to hear and determine, and not to take proofs and report them to the court. See *Lincoln v. Lincoln*, 6 Rob. 525; *Diddell v. Diddell*, 3 Abb. 167.

e. Proceedings on reference. The court has no power in any case to order the reference to a referee nominated by either party. Rule 87. Rule 89 provides that on a reference to take proof of

Report — Enlarging time for entry — Application for order, where made.

the facts charged in a complaint for separation or limited divorce, the examination of the plaintiff on oath may be taken as to any cruel or inhuman treatment alleged in the complaint, which took place when no witnesses were present who are competent to testify to the facts on such reference.

See, generally, as to proceedings and reference in divorce cases, chapter 6, 345, 346.

f. Report. The report of the referee, when made, is required to be filed with the clerk in the usual manner, as prescribed by rule 39 of the supreme court, and is made the ground of the subsequent application for judgment. If the report is found insufficient, the court may order it to be recommitted to the referee to take further proof. *Arborgast v. Arborgast*, 8 How. 297.

g. Application for judgment. The proceedings upon application for judgment, see *ante*, art. 1, § 5, 562.

ARTICLE VIII.

ENLARGING TIME FOR ENTRY.

Section 1. Time for entry of judgment may be extended. The time within which judgment should be entered may be enlarged or extended, under section 405 of the Code, which provides for the enlargement of the time within which any proceeding in an action must be had, after its commencement, upon showing proper grounds for such enlargement. See Code, § 405.

Section 2. Application for order, where made. The application for an order enlarging the time for entry must be made to a judge of the court, or, if the action be in the supreme court, to a county judge. Code, § 405. The provisions of this section of the Code relate solely to the powers of a judge of the court *at chambers*, and have no application to the power of the court. *Haase v. The New York Central R. R. Co.*, 14 How. 430; *Traver v. Silvernail*, 2 Code R. 96.

Section 3. Application, how made. The application must be made upon an affidavit setting forth the grounds of the motion. Code, § 405.

Section 4. Service of affidavit and order. The affidavit, or a copy of the same, must be served with a copy of the order, or the order may be disregarded. *Ib.*

Procuring verdict, report, decision, etc. — Compelling entry of judgment.

The copy of the affidavit served should be perfect, including signature of counsel, jurat, etc. *Littlejohn v. Munn*, 3 Paige, 280. Though *it seems* that the omission of the jurat does not render the proceedings irregular in those cases where the opposite party had an opportunity to inspect the original. See *Barker v. Cook*, 40 Barb. 254; S. C., 16 Abb. 83; 25 How. 190; *Graham v. McCoun*, 5 How. 353; S. C., 1 Code R. N. S. 43; Sup. Ct. Rule 30. See *Motions and Orders*. And where a party, through mistake, has omitted to serve a copy order, or a copy of the affidavit on which the order was granted, he is entitled to relief on terms. *Quinn v. Case*, 2 Hilt. 467, 470; 9 Abb. 160.

ARTICLE IX.

PROCURING VERDICT, REPORT, DECISION, ETC.

Section 1. What papers are necessary on entry of judgment. Judgment may be entered upon the verdict of a jury, the report of a referee, or the decision of a judge. In an action tried by the court without a jury, the only authority for entering judgment is the decision of the judge who tried the cause; and the clerk has no authority to include any thing in the judgment not embraced in the decision. *Chamberlain v. Dempsey*, 14 Abb. 241; S. C., 9 Bosw. 212; *Loeschigk v. Addison*, 3 Rob. 331; S. C., 19 Abb. 169.

Section 2. Service, with notice of judgment. By rule 39 of the supreme court, upon a trial by referees, a copy of the final report is required to be served with notice of the judgment.

ARTICLE X.

COMPELLING ENTRY OF JUDGMENT.

Section 1. Object of compelling entry of judgment. The object of compelling the entry of judgment is to fix the time within which to bring an appeal, as an appeal cannot be taken until the judgment roll is filed. See *McMahon v. Harrison*, 5 How. 360; *Bradley v. Van Zandt*, 3 Code R. 217.

Section 2. Entry of judgment, how compelled. Where the prevailing party delays entering up his judgment, the opposite party, by means of a motion and order of the court, may compel him to take the necessary proceedings for that purpose.

Effect of delay in entry by clerk—Preparing papers for judgment roll.

Bank of Geneva v. Hotchkiss, 1 Code R. N. S. 153; S. C., 5 How. 478; *Lentilhon v. Mayor, etc., of New York*, 1 Code R. N. S. 111; S. C., 3 Sandf. 721; *Purdy v. Peters*, 15 Abb. 160; S. C., 23 How. 328; *Peet v. Cowenhoven*, 14 Abb. 56.

Section 3. Effect of delay in entry by clerk. Delay on the part of the clerk to enter a final decree in the judgment book does not affect its validity. *Lynch v. Rome Gas-Light Co.*, 42 Barb. 591; *Butler v. Lee*, 33 How. 251; S. C., 3 Keyes, 70. And where the actual entry of judgment in the judgment book was delayed over two months—it appearing that the clerk had filed a request to docket the judgment, and had given a *transcript*—it was held that this did not invalidate proceedings on execution, nor an order for the examination of the judgment debtor. *Appleby v. Barry*, 2 Rob. 689.

A substantial compliance with the requirements in regard to docketing judgments, seems to be all that is absolutely necessary. *Ib.* See *Stimson v. Huggins*, 16 Barb. 658; S. C., 9 How. 86; *Sears v. Burnham*, 17 N. Y. (3 Smith) 445; 2 Bradf. 394.

ARTICLE XI.

PREPARING PAPERS FOR JUDGMENT ROLL

Section 1. What papers constitute. It is provided by the Code that the following papers shall constitute the judgment roll :

1. In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases the summons, pleadings or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment. Code, § 281.

Although the first subdivision of this section of the Code specifies what the roll shall contain in cases where the complaint is not answered, yet it should really contain, in addition, all orders and papers "necessarily affecting the judgment," as required by subdivision 2. Thus, where the summons has been amended by order of the court, or where parties have been added or stricken out, the order directing the amendment, or adding or striking out the name of a party, should be inserted

as well in cases of default as in other cases, otherwise the judgment, appearing to vary from the original summons, will show on the face of the record that it is irregular. 1 Van. Santv. Eq. Pr. 137.

When an issue of fact has been tried by a jury, a copy of the *verdict* is a necessary part of the roll. If the trial be had before a referee the *report* must be inserted. And, in like manner, if the trial of the issue is by the court alone, the *decision* is a part of the roll. *Thomas v. Tanner*, 14 How. 426.

The taxed bill of costs and affidavits used upon taxation, notice of adjustment and notice of application for judgment, the proof of the filing of *lis pendens*, etc., being merely collateral to the judgment, and not "necessarily affecting" it, need not be inserted in the judgment roll, though they should be filed. *Schenectady and Saratoga Plank Road Co. v. Thatcher*, 1 Code R. N. S. 380; S. C., 6 How. 226; *Kerrigan v. Ray*, 10 id. 213; *Cook v. Dickerson*, 1 Duer, 679; *Corwin v. Freeland*, 6 N. Y. (2 Seld.) 560.

Where joint debtors have been sued and one makes default, but the other answers and goes to trial, it has been held unnecessary to annex an affidavit of no answer, to the roll, on taking judgment against both at the trial. *Catlin v. Latson*, 4 Abb. 248; S. C., 13 How. 511; 16 N. Y. (2 Smith) 622.

Where there have been two trials of a cause in the supreme court, the case and exceptions made upon the first trial should not be incorporated into the record at the close of the second trial. *Wilcox v. Hawley*, 31 N. Y. (4 Tiff.) 648. See *Schenectady and Saratoga Plank Road Co. v. Thatcher*, 1 Code R. N. S. 380; S. C., 6 How. 226.

Section 2. Papers, by whom furnished. The early practice under the Code devolved the duty of making up the judgment roll upon the clerk, and he was held responsible for its correctness (*Renouil v. Harris*, 1 Code R. 125; S. C., 2 Sandf. 641); but, under the Code as it now stands, the judgment roll may be furnished by the party or his attorney. Code, § 281. Where this is done, however, it is still the duty of the clerk to see that the roll so furnished contains all the necessary component parts, and if clearly defective he may refuse to receive it. *Whitehead v. Pecare*, 9 How. 35.

It is optional with the successful party to furnish the roll or not, and he cannot be compelled to do so. In the event of his

Adjustment and re-adjustment of costs.

neglect, it is then the duty of the clerk to collect the necessary papers from the file, attach them together, and to annex thereto a copy of the judgment. *Heinemann v. Waterbury*, 5 Bosw. 686; *Earle v. Barnard*, 22 How. 437. And, on motion of the adverse party, the court will compel the performance of this duty. *Ib.* See *Lentilhon v. Mayor of New York*, 1 Code R. N. S. 111; S. C., 3 Sandf. 721.

ARTICLE XII.

ADJUSTMENT AND RE-ADJUSTMENT OF COSTS.

Section 1. What is an adjustment of costs. As this proceeding is fully treated of in the chapter on costs (see *ante*, 551, ch. ix), it will be only necessary to refer to a few of its more prominent features in this connection, as an incident of judgment. The manner in which the adjustment of costs is to be made is prescribed by the provisions of section 311 of the Code.

Section 2. Notice of adjustment. Notice of the adjustment is required to be given by the prevailing party to the adverse party, in the same manner that other notices are served. The period prescribed for the notice to be given is five days, except when the attorneys for all the parties reside in the same city, village, or town, when two days' notice only is required. Code, § 311.

The notice, when served, must be accompanied by a copy of the items of the costs and disbursements claimed, and the disbursements must be stated in detail and verified by affidavit. *Ib.*

In a case where, under the provisions of the Code, the defendant is entitled to costs against the plaintiff, although the latter recover the amount of his claim, the former is then the prevailing party, within section 311 of the Code, and should give the notice and proceed to a taxation, in order to secure the due insertion of his costs in the judgment roll. See *Peet v. Warth*, 1 Bosw. 653; *Johnson v. Sagar*, 10 How. 552.

See further, as to notice of adjustment, ch. ix, *ante*, 552.

Section 3. By whom adjusted. Final costs are to be adjusted by the clerk of the court in which the action is pending. Code, §§ 311, 466. In the supreme court, the clerk of the county of venue or place of trial is the proper officer. *Ib.*

Costs of the court of appeals should be adjusted by the clerk of the court below, where the judgment record is filed. *Union India Rubber Co. v. Babcock*, 1 Abb. 262; S. C., 4 Duer, 620.

Effect of omission of notice.

In no case will the court of appeals interfere with the taxation of costs except upon appeal from a regular proceeding in a court below. *Dresser v. Brooks*, 4 How. 207; S. C., 2 N. Y. (2 Comst.) 559; 2 Code R. 130.

Section 4. Effect of omission of notice. The effect of an omission to give due notice of adjustment of costs is to make the adjustment irregular; but the regularity of the judgment is not affected by such omission, and it will be allowed to stand. *Petrie v. Fitzgerald*, 2 Abb. N. S. 354; *Hoffnung v. Grove*, 18 Abb. 14; *Potter v. Smith*, 9 How. 262; *Dix v. Palmer*, 5 How. 233; S. C., 3 Code R. 214; *Hughes v. Mulvey*, 1 Sandf. 92; *Tracy v. Humphrey*, 1 Code R. N. S. 197; *Gilmartin v. Smith*, 4 Sandf. 684; *Rickards v. Swetzer*, 3 How. 413; S. C., 1 Code R. 117; *Henry v. Bow*, 20 How. 215; *Lawrence v. Bank of the Republic*, 6 Rob. 497. The only consequences resulting from an irregular adjustment will be an order directing a re-adjustment of the costs, at the expense of the party omitting to give the notice, and that such party pay the costs of the motion to obtain the re-adjustment. *Potter v. Smith*, 9 How. 262; *Stimson v. Hug-gins*, 16 Barb. 658; S. C., 9 How. 86. See cases cited above.

In a few of the earlier cases the omission to give the proper notice of the adjustment of costs was held to be a fatal defect. See *Elson v. New York Equitable Insurance Co.*, 2 Code R. 30; S. C., 2 Sandf. 654; *Bank of Masillon v. Dwight*, 2 Code R. 49; *Doke v. Peek*, 1 id. 54; *Coldsmith v. Marpe*, 2 id. 49; S. C., 7 N. Y. Leg. Obs. 351. These cases would all seem to be overruled by the later authorities. See ch. ix, *ante*, 553.

Section 5. Re-adjustment, when necessary. As already stated in the last section, a re-adjustment of costs becomes necessary, and may be compelled where a party obtains the insertion of the costs in the entry of judgment and an adjustment without giving the notice required by section 311 of the Code. See, *ante*, 558, § 4.

As to a re-adjustment by the prevailing party, where, to prevent anticipated fraud, he has entered up judgment at once, without waiting to give the required notice, see *Stimson v. Hug-gins*, 9 How. 86; S. C., 16 Barb. 658; and see chapter on Costs, *ante*, 551, where the whole subject of adjustment of costs is fully treated.

CHAPTER II.

NATURE OF JUDGMENT, AND THE RELIEF.

ARTICLE I.

NATURE AND DEFINITION.

Section 1. What is a judgment. In practice the term "judgment" has been made the subject of various definitions, a few of which are here given. By Blackstone it is said to be "the sentence of the law, pronounced by the court upon the matters contained in the record." 3 Bla. Com. 395. So it has been defined as "the conclusion of law upon facts found or admitted by the parties, or upon their default in the course of the suit." Tidd's Pr. 930. Bouvier defines a judgment as "the decision or sentence of the law, given by a court of justice or other competent tribunal as the result of proceedings instituted therein for the redress of an injury." Bouv. Dict. A judgment appears to be a judicial opinion in answer to a question caused by a suit. If no reason is assigned for that opinion, it appears to be a proposition exclusively confined to the question demanded. Ram. Leg. Judg. 52. See 1 Wait's Pr. 427; 1 Wait's Law & Pr. 689.

By the Code a judgment is defined as "the final determination of the rights of the parties in the action." Code, § 245. And it is held to have precisely the same signification in all the different sections of that instrument wherever the term is found. See *Hollister Bank of Buffalo v. Vail*, 15 N. Y. (1 Smith) 593; *Lawrence et al. v. The Farmers' Loan and Trust Co.*, 6 Duer, 689; S. C., 15 How. 57. At common law judgments were either *interlocutory* or *final*. See 1 Wait's Pr. 427. But under our present practice there can be no such thing as an interlocutory judgment in any case. The only judgment authorized or permitted by the Code is a final determination of the rights of the parties to the action. *Nolton v. The Western R. R. Corporation*, 10 How. 97; *Belmont v. Ponvert*, 3 Rob. 693, 698 (n). It should also be remembered that the term *decree*, as used under the former chancery practice to designate a sentence or order of the court corresponding to the *judgment* of a court of law, is not retained under the Code, the word *judgment* being employed to designate the final deter-

mination of the rights of the parties, whether the action be legal or equitable in its nature. See 1 Wait's Pr. 445.

Section 2. Relation of judgments to the common law. The following general principles of the law of England are said to be the materials of a judgment: "The law of nature; the revealed law of God; christianity; morality and religion; common sense; legal reason; justice; natural justice; natural equity; humanity." Ram. Leg. Judg. 33.

In the United States the "materials of a judgment are: 1. The constitution of the United States, and the laws and treaties of the United States made in pursuance of it; 2. The constitution of the State; 3. The reported cases in the State courts; 4. The law of nature, morality and religion, common sense, legal reason, and whatever else goes to establish the great principles of universal justice; 5. The common law and usages of the country; and, 6. The laws and decisions of other States and countries consistent with our own laws and institutions." Powell's Analysis, book 3, ch. 11, p. 396.

The common law, which enters so largely into the materials of a judgment, is a system of principles, usages and rules of action applicable to the government and security of person and property, which derives its force and authority from the universal consent and the immemorial practice of the people, and does not rest upon any express or positive act or declaration of the legislature. As much of the English common law has been adopted in this country, and since much of it is founded upon usages and customs as old as the primitive Britons, or upon the later usages and customs introduced by the Romans, the Picts, the Saxons, the Danes and the Normans, it so happens that the rules which we follow as laws must be traced through a vast field, and to a remote antiquity. As these rules are not inflexible like statutes, and as the decisions of the courts are numerous, and embrace a great variety, the rules are thus made available to meet the wants of every new or intricate case which may be brought before the court.

Section 3. Difference between statutory and judicial law. Preparatory to the consideration of the binding force of judgments as precedents, it will be proper in this section to briefly point out the difference between statutory and judicial law, and to inquire how the latter is made.

A statute is a law established by an act of legislative power.

It is the written will of the legislature, solemnly expressed according to the forms necessary to constitute it a law of the State or government.

The decisions of the courts are also called *laws*, and they differ from statutes as to the occasion and the manner in which they are made. So far as a decision of the courts can be called making a law, it may be said that a law made judicially is one made on the rendering of a judicial decision. In such a case the direct and proper object of the court is the decision of some specific point in the particular case, and not the establishment of a general rule of law. The decision may be followed as a law, and, therefore, the court, in making it, may consider its effects as a general rule of law.

A statute law is made solely for the purpose of declaring a rule a law, and not as a mode of deciding what the rule ought to be in a particular case. A statute is expressed in general or abstract terms, or wears the form or shape of a law or rule.

A law made by judicial decisions does not exist anywhere in a general or abstract form. Before it can be known, it must be gathered from the grounds or reasons of the specific decision or decisions by which it was virtually established. It is therefore implicated with the peculiarities of the specific case or cases, to the adjudication or decision of which it was applied by the tribunals. In order that its import may be correctly ascertained, the peculiar circumstances of the cases to which it was applied, as well as the general propositions which occur in the decisions, must be observed and considered. For those general propositions being thrown out by the tribunals with a view to the decision of a specific case, they must be taken in conjunction with, and must be limited by, the specific or individual peculiarities by which that case was distinguished.

Such general propositions, occurring in the course of a decision, as have not this implication with the specific peculiarities of the case, are commonly styled extra judicial, and commonly have no authority. See Austin's Jur. 642, 643; see, also, *id.* 648, 649.

Section 4. Judgments, how far binding as precedents. A chief object aimed at by the courts in constructing their judgments, is certainty in the law; and to cause their judgments to have this effect is their constant and most anxious desire. It has been well said, that "it is better the law should be certain, than that every judge should speculate upon improvements in it" (Lord ELDON,

in *Sheddon v. Goodrich*, 8 Ves. 482, 497); hence, the principle of adopting *precedents* as the guide of judicial decisions.

It is of the utmost importance in almost every case, that a rule once laid down and firmly established, and continued to be acted upon for a long period of time, should not be changed, unless it appears clearly to have been founded upon wrong principles; for, if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law. *Bates v. Relyea*, 23 Wend. 336; *Anderson v. Jackson*, 16 Johns. 382, 402; *Goodell v. Jackson*, 20 Johns. 694, 722; *Selby v. Bardons*, 3 Barn. & Adol. 2, 17; *Goodtitle v. Otway*, 7 Term R. 399, 419; *Butler v. Duncomb*, 1 P. Wms. 449, 451; *Fletcher v. Soudes*, 3 Bing. 502, 588; *Van Winkle v. Constantine*, 10 N. Y. (6 Seld.) 422, 426. And the language of Sir WILLIAM JONES, on this point, is exceedingly forcible. "No man," says he, "who is not a lawyer would ever know how to act; and no man who is a lawyer would, in many instances, know what to advise, unless courts were bound by authority as firmly as the Pagan deities were supposed to be bound by the decrees of fate." Jones' Essay on Bailment, 69, 70.

A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient for the public, if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and trust, and to deal with each other. See 1 Kent's Com. 475, 476.

As regards the sacredness of precedents, a distinction may very properly exist betwixt those which uphold and those which have a tendency to subvert contracts and titles. Thus, it has been stated, that when the rules laid down by the courts become the laws which sustain titles and contracts, they are in general to be sacredly adhered to, but when they can

Dicta, how far authority.

be used only as instruments of destruction, error ceases to be sacred, and principle and truth ought to be re-asserted. *Comstock, J.*, in *Church v. Brown*, 21 N. Y. (7 Smith) 315, 335.

The great difficulty to be encountered, as to cases, consists in making an accurate application of the general principle contained in them to new cases presenting a change of circumstances; for, if the analogy be imperfect, the application may be erroneous.

The expressions of every judge must also be taken with reference to the case on which he decided; and the principle of the decision must be looked to, and not the manner in which the case is argued upon the bench, otherwise the law will be thrown into utter confusion. See *Richardson v. Mellish*, 2 Bing. 229, 242; *Cohens v. Virginia*, 6 Wheat. 264, 399.

Section 5. Dicta, how far authority. A *dictum* may be defined as "an opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication." *Bouv. Dict.* Or, it may be denominated, an extra-judicial opinion, that is, an opinion given on a question, that it was unnecessary to decide in the case where it was given.

Although, strictly speaking, an opinion can be considered an authoritative precedent upon those points only which were essential to the decision of the cause, yet *dicta* constitute materials which a judge is bound, in some degree, to regard in constructing a judgment which he gives. See *Wyndham v. Chelwynd*, 1 Wm. Bla. 96, 101; *The King v. Mayor, etc., of Portsmouth*, 3 B. & C. 153, 156; *Pearson v. Henry*, 5 Term R. 6; *Brisbane v. Dacres*, 5 Taunt. 143, 159; *Thompson v. Brown*, 7 id. 656, 671; *Sidney v. Shelley*, 19 Ves. 352, 357, 360, 365; *Mills v. Farmer*, 19 id. 483, 488; *Lord St. John v. Lady St. John*, 11 id. 526, 529, 530; *Whittaker v. Whittaker*, 4 Bro. C. C. 31, 37; see, also, *Dain v. Wyckoff*, 18 N. Y. (4 Smith) 45; S. C. before, 7 N. Y. (3 Seld.) 191. But as regards their value as authority, it has been observed that "we must consider that the *dicta* of judges, stated by reporters upon collateral points, not in judgment before them, are always to be taken with great allowance." *Clennell v. Lewthwaite*, 2 Ves. 465, 473.

A universal practical guide to set a just value on *dicta*, is to bear in mind that particular circumstances may augment or lessen their value.

Dicta, how far authority.

A circumstance that may serve to augment the value of a *dictum* may be :

1. That it is a deliberate and well-considered opinion.
 2. That it is consonant to known practice.
 3. That it is not a mere *dictum*, but a part of the argument, or is a main part of the argument.
 4. That, as authority, it has been cited on the bench.
 5. That it is an ancient *dictum* which has, in several cases, been cited as authority, and no case has determined it not to be law.
 6. That it is the *dictum* of a judge of great judicial character.
- See Ram. Leg. Judg. 102, 103.

A circumstance that may lessen the value of a *dictum* may be :

1. That it is void of principle.
2. That it is extra-judicial. *Dicta* upon points not in controversy have little weight.
3. That it has never been followed up.
4. That it is an *obiter dictum* only.
5. That it is an opinion at *nisi prius* only.
6. That no such doctrine is to be found in another report of the same case by a learned judge, who joined in the judgment in that case.
7. That the case did not call for the proposition so generally expressed.
8. That the doctrine is not referred to in a judgment in any subsequent case to which it would apply.
9. That the proposition is not supported by the authority which the judge quoted for it.
10. That in the decision of the case in which the *dictum* occurs, the judge who expressed it was in a minority.
11. That the case in which the *dictum* is found is inaccurately reported.
12. That the same judge has expressed an opinion tending a contrary way. See Ram. Leg. Judg. 104, 107.

A decision may be right, notwithstanding some *dicta* in it which cannot be supported. See *Palmer v. Moxon*, 2 Maule & Selw. 43, 50; *Hutchison v. Birch*, 4 Taunt. 619, 626; see, also, *Keller v. Phillips*, 39 N. Y. (12 Tiff.) 351, 354; S. C., 7 Trans. App. 124. And a mere *obiter* opinion ought never to weigh against the settled direct authority of the cases which have been deliberately and upon argument determined the other way.

 Distinction between order and judgment.

Thompson v. Brown, 7 Taunt. 656, 674; S. C., 1 Moore, 358; *Saunderson v. Rowles*, 4 Burr. 2064, 2068; *The King v. Higgins*, 2 East, 5, 17; *Honner v. Morton*, 3 Russ. 65, 85, 86.

ARTICLE II.

DISTINCTION BETWEEN ORDER AND JUDGMENT.

Section 1: Judgments and orders, how distinguished. We have seen that a judgment, as defined by the Code, is "the *final* determination of the rights of the parties in the action" (§ 245; *ante*, art. 1, § 1), and it is this *finality* of what is termed a judgment that constitutes the broad distinction between it and an order, which, as defined by the Code, is "every direction of a court or judge made or entered in writing and not included in a judgment." § 400.

The distinction intended by the Code between an order and a judgment is said to be this: "An order is the decision of a motion; a judgment is the decision of a trial." See *King v. Stafford*, 5 How. 30; *Bentley v. Jones*, 4 id. 335; S. C., 3 Code R. 37. The distinction becomes important in relation to the subject of appeals, for wherever the decision sought to be reviewed is not a *final judgment*, within the definition just given, and is not embraced in and forms no part of such judgment, the appeal is from an *order* merely, and the right of appeal is to be determined by the principles governing the practice of the court in the latter class of appeals. See *Lawrence v. Farmers' Loan and Trust Co.*, 15 How. 57; S. C., 6 Duer, 689.

As a general rule the distinction to be observed is sufficiently obvious to enable the practitioner to avoid the risk of confusion; but there are two classes of cases, however, in which there has been some difficulty in drawing the exact line. These are decisions on motions for judgment on frivolous pleading, and decisions on issues of law, both of which will be treated separately in the two following sections.

Section 2. Decision on motion for judgment on frivolous pleading. In both classes of cases just referred to the true test seems to be as to whether leave to amend or to plead over is or is not granted, to which, in the case of demurrer, may be added the further test as to whether the demurrer is or is not to the whole pleading. Where the defeated party is permitted, or still retains

Decision on motion for judgment on frivolous pleading.

the right to go to trial upon issues of fact, either upon the residue of the pleading not impeached by the demurrer or upon another pleading substituted in its place, by way of amendment, then it is evident that the decision is not a "final determination of the rights of the parties in the action," and hence is not a judgment within the terms or spirit of section 245 of the Code. See *Bernhard v. Kapp*, 11 Abb. N. S. 342; *Phipps v. Van Cott*, 4 Abb. 90; *Lee v. Ainslie*, id. 90 (n); *Cook v. Pomeroy*, 10 How. 221; *Bauman v. The N. Y. Central R. R. Co.*, id. 218. On the other hand, if the decision goes the full length of declaring the pleading impeached to be frivolous, or allows a demurrer to the whole of it without granting leave to amend or to plead over, so that the adjudication finally determines the rights of the unsuccessful party, leaving him no ulterior remedy except by way of appeal, in such case it is clearly a judgment. See *Bauman v. New York Central R. R. Co.*, 10 How. 218; *Harris v. Hammond*, 18 id. 123; 2 Whit. Pr. 492; *Hill v. Simpson*, 11 Abb. N. S. 343.

In the following cases it is held that the decision on the motion for judgment on a frivolous pleading, under section 247 of the Code, is a judgment carrying costs, and is appealable as such and not as an order. *Ib.*; *Joannes v. Day*, 8 Rob. 650; *Witherhead v. Allen*, 28 Barb. 661; *Harris v. Hammond*, 18 How. 123; *King v. Stafford*, 5 id. 30; S. C., 6 id. 127; *Lawrence v. Davis*, 7 id. 354; *Pratt v. Allen*, 19 id. 450; *Roberts v. Morrison*, 7 id. 396; S. C., 11 N. Y. Leg. Obs. 61; *Bruce v. Pinckney*, 8 How. 397; *Rayner v. Clark*, 7 Barb. 581; S. C., 3 Code R. 230; *Martin v. Kanouse*, 2 Abb. 390. And where an application for the decision was made as for an order, it was held that judgment could not be given under section 247 of the Code. Such decision must be applied for as a judgment. *Darrow v. Miller*, 3 Code R. 241; S. C., 5 How. 247; *Rae v. Washington Mut. Ins. Co.*, 1 Code R. N. S. 185; S. C., 6 How. 21..

In other cases it is held that the application for judgment under section 247 of the Code is similar to the application made under the second subdivision of section 246; that the decision may be appealed from as an order, and that the successful party is entitled only to the costs of a motion, and cannot charge a trial fee. *Bernhard v. Kapp*, 11 Abb. N. S. 342; *Butchers & Drovers' Bank of Providence v. Jacobson*, 22 How. 470; *Witherspoon v. Van Dolar*, 15 id. 266; *Marquisee v. Brigham*, 12 id. 399; *Rochester City Bank v. Rapelje*, id. 26; *Western R. R.*

Decision on issue of law.

Corp. v. Kortright, 10 id. 457; *Roberts v. Clark*, id. 451; *Gould v. Carpenter*, 7 id. 97. It may be observed, with reference to most of these cases, that leave to amend or to plead over was granted, and where such leave is given the decision is clearly not final, and an appeal will lie from it.

Some of the cases have held that the decision on a frivolous demurrer may, under the terms of section 349, be appealed from as an order, if such appeal be taken before the entry of judgment, but not afterward. See *Lee v. Ainslee*, 1 Hilt. 277; S. C., 4 Abb. 463; id. 90 (n); *Witherhead v. Allen*, 28 Barb. 661. But, if it be so appealed from, it will not bring the case up finally before the court of appeals, but a second appeal from the judgment, when entered, will be necessary. See *Ford v. David*, 13 How. 193; S. C., 3 Abb. 385; 5 Duer, 684.

From an examination of the cases cited, it will be seen that the decisions are far from being harmonious; and until the question is settled in a more authoritative manner it may still be regarded as an open one.

Section 3. Decision on issue of law. It may be laid down as a rule well settled, that where the demurrer is to the whole pleading, and leave to amend or plead over is not granted by the decision, it cannot be appealed from as an order; and that the decision in such case is to all intents and purposes a judgment, and not an order. *Mora v. The Sun Mut. Ins. Co.*, 13 Abb. 304; S. C., 22 How. 60; *Reynolds v. Freeman*, 4 Sandf. 702; *Bauman v. The New York Central R. R. Co.*, 10 How. 218; *Dolph v. White*, 8 id. 275. And the same is true of the decision, where leave to amend or plead over is given, but the party declines or neglects to avail himself of the leave, within the time and upon the terms prescribed. *Drummond v. Husson*, 1 Duer, 633; S. C., 8 How. 246. The only mode of review is, by an appeal from the judgment when perfected. *Reynolds v. Freeman*, 4 Sandf. 702; *Dolph v. White*, 8 How. 275; *Mora v. The Sun Mut. Ins. Co.*, 13 Abb. 304; S. C., 22 How. 60.

If, however, the demurrer relates only to a part of a pleading, the decision sustaining or overruling it may with propriety be termed an order, since its only effect is to strike out or retain that part of the pleading to which the demurrer applies, leaving the other issues undetermined. See *Drummond v. Husson*, 1 Duer, 633; S. C., 8 How. 246. And from such decision an appeal is expressly given as from an order, by section 349 of the Code

Joint judgments.

as amended in 1851. See *Ives v. Miller*, 19 Barb. 196; *Paddock v. The Springfield Fire and Marine Ins. Co.*, 12 N. Y. (2 Kern.) 591; *Ferris v. Aspinwall*, 10 Abb. N. S. 137; *Sutherland v. Tyler*, 11 How. 251; *Cook v. Pomeroy*, 10 id. 221; *Bauman v. The New York Central R. R. Co.*, id. 218; *Belknap v. McIntyre*, 2 Abb. 366. Previous to the above amendment of 1851, it was held that the decision of the court in such case was a judgment, and that no appeal would lie from such decision until judgment should be entered. *Bentley v. Jones*, 4 How. 335; S. C., 3 Code R. 37; *King v. Stafford*, 5 id. 30; *Wood v. Lambert*, 3 Sandf. 724; S. C., 1 Code R. N. S. 214; *Masters v. Barnard*, id. 407; S. C., 6 How. 113. See *Nolton v. Western R. R. Corp.*, 10 How. 97.

When leave to amend or plead over is granted, the decision, during the time such leave is pending, retains the character of an order and may be appealed from as such. See *Nolton v. Western R. R. Corp.*, 10 How. 97; S. C. affirmed, 15 N. Y. (1 Smith) 444; *Phipps v. Van Cott*, 4 Abb. 90; *Christy v. Libby*, 3 Abb. N. S. 423; *Ford v. David*, 13 How. 193; S. C., 3 Abb. 385; 5 Duer, 684; *Barker v. Cocks*, 50 N. Y. (5 Sick.) 689; *Bauman v. New York Central Railroad Co.*, 10 How. 218; *Nellis v. De Forrest*, 6 id. 413; *Ives v. Miller*, 19 Barb. 196; *Cook v. Pomeroy*, 10 How. 221; *Reynolds v. Freeman*, 4 Sandf. 702.

ARTICLE III.

JOINT JUDGMENTS.

Section 1. Distinction between joint and several judgments. In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. Code, § 274.

The true test as to when this discretion may, with propriety, be exercised by the court, is, whether the defendants are or are not strictly joint debtors; and it may be stated as a general rule that, "whenever the interests of the defendants are either several or severable in their nature, a several judgment may be rendered; but, if they are strictly and technically joint, a several judgment cannot be rendered." See 2 Whit. Pr. 539.

Section 2. When a judgment may be joint. In all actions upon contracts, against defendants who are joint debtors in the strict

Entry and effect of joint judgment.

sense of the term, the plaintiff must recover, and must enter up his judgment against all or none, where no several defense is interposed. This is the general rule; but where, in such case, part only of the defendants are served with process, judgment, if recovered, may be entered against all the defendants, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served. See Code, § 136, subd. 1; *Northern Bank of Kentucky v. Wright*, 5 Rob. 604; *Brown v. Richardson*, 4 id. 603; *Stannard v. Mattice*, 7 How. 4; *Wright v. Marshall*, 3 Daly, 331; *Leahey v. Kingon*, 22 How. 209; S. C., 13 Abb. 192; *Bacon v. Comstock*, 11 How. 197; *Rich v. Husson*, 4 Sandf. 115; *Fullerton v. Taylor*, 6 How. 259; S. C., 1 Code R. N. S. 411.

And this provision has been held to be applicable where one of the defendants, who was not served, died before the trial; a motion by the surviving defendants to compel the plaintiff to bring in, as parties defendant, the personal representatives of the deceased defendant having been denied. *Wright v. Marshall*, 3 Daly, 331.

A judgment entered by a defendant against joint plaintiffs cannot be severed. Thus, where one of several plaintiffs dies, pending an action, the cause of which survives, and the defendant enters judgment against all, no order to proceed in favor of the surviving plaintiffs having been made, the judgment is irregular and will be set aside. *Holmes v. Honie*, 8 How. 383. The judgment, in such case, being joint, cannot be amended and allowed to stand as against the surviving plaintiffs. *Ib.*

Section 3. Entry and effect of joint judgment. The provisions of the Revised Statutes (2 R. S. 377, 390, § 1), in reference to the proceedings against joint debtors, have not been repealed by the Code, but are still subsisting. *Sterne v. Bentley*, 1 Code R. 109; S. C., 3 How. 331. Hence, "in all actions against two or more persons jointly indebted upon any joint obligation, contract or liability, if the process issued against all the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff; and, in such case, the judgment, if rendered in favor of the plaintiff, shall be against all the defendants in the same manner as if all had been served with process." 2 R. S. 377 (391), § 1. See *Merrifield v. Cooley*, 4 How. 272; *Lahey v. Kingon*, 22 id. 209; S. C., 13 Abb. 192; *Northern Bank of Kentucky v. Wright*, 5 Rob. 604. And it

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seems that the judgment cannot be entered otherwise than in such form. *Stannard v. Mattice*, 7 How. 4; *Crandall v. Beach*, id. 271; *Bridge v. Payson*, 5 Sandf. 210; *Mechanics and Farmers' Bank v. Rider*, 5 How. 401.

It should, however, be observed that this rule has no application in a case where the heirs of a person dying intestate are sued for his debts. Although the statute, in such case (see Laws of 1837, p. 537, § 73), requires them to be sued together jointly, and not separately, it does not make them jointly liable as joint debtors. Each is liable, severally, for his due proportion. *Kellogg v. Olmsted*, 6 How. 487.

The effect of the entry of a joint judgment against a party not served is to bind all property in which he has a joint interest (see Code, § 136); but such entry can have no effect whatever as to his separate estate or his person. *Ib.* Nor is it even *prima facie* evidence of his liability, which must be rebutted. 2 R. S. 377 (392), § 2; *Matter of Austin*, 44 Barb. 434; *Johnson v. Smith*, 23 How. 444; S. C., 14 Abb. 421; *Matter of Lowenstein*, 7 How. 100. And no collateral proceeding can be sustained, nor can an action be brought merely upon the record of the judgment against such a person, without collateral proof of his liability. *Ib.*; *Oakley v. Aspinwall*, 4 N. Y. (4 Comst.) 513; S. C. before, 1 Duer, 1; 10 N. Y. Leg. Obs. 79; S. C. affirmed, 13 N. Y. (3 Kern.) 500.

Where the circumstances under which a judgment of this description is obtained are such as to countenance suspicion that it was the result of fraud or connivance, it will be opened as against a defendant not served, for the purpose of letting in his defense. *Cleveland v. Porter*, 10 Abb. 407.

Section 4. Proceedings under Revised Statutes to enforce separate liability. By the provisions of the Revised Statutes (2 R. S. 377, 378 [391, 392]), authority is given for proceedings against the defendants who have been served, similar to that conferred by section 136 of the Code. The statutes provide that if judgment be reversed, it "shall be against all the defendants, in the same manner as if all had been served with process." 2 R. S. 377 (391), § 1. And that "such judgment shall be conclusive evidence of the liability of the defendant who was personally served with process in the suit, or who appeared therein; but against every other defendant, it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall

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Proceedings under Code — Summons to show cause, when proper.

have been established by other evidence." 2 R. S. 377 (391), § 2. Further provisions are made by the statute, with respect to the issuing of execution under a judgment so entered. 2 R. S. 377 (391), §§ 3, 4; and see Execution, *post*.

Where judgment has been obtained against two defendants as above described, it may be rendered operative as a judgment against both in the following manner: A second action may be brought against both defendants, alleging the recovery of the former judgment, and setting out the joint obligation, and serving process only on the defendant not served in the former action, and a like judgment obtained against the latter defendant. Such an action is not superseded by the provisions of section 375 of the Code, the remedy therein provided being merely cumulative. *Prince v. Cujas*, 7 Rob. 76; *Dean v. Eldridge*, 29 How. 218. But see, *contra*, *Lane v. Salter*, 4 Rob. 239.

Section 5. Proceedings under Code. The proceedings authorized by the Code for the enforcement of a judgment originally taken as above, is regulated by the special provisions of section 375. This section provides that "when a judgment shall be recovered against one or more of several persons, jointly indebted upon a contract, by proceeding as provided in section 136, those who were not originally summoned to answer the complaint, may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned."

The proceedings thus described is confined to courts of record, and hence has no application to a judgment in a justice's court, a transcript of which has been filed in the office of the county clerk. *Johnson v. Smith*, 14 Abb. 421; S. C., 23 How. 444; *Prince v. Cujas*, 7 Rob. 76; *Ticknor v. Kennedy*, 4 Abb. N. S. 417; reversing S. C., 3 id. 387. And the proceeding not being a new action, the party served cannot have it removed into a federal court. *Fairchild v. Durand*, 8 Abb. 305. See *Kranshaar v. New Haven Steamboat Co.*, 7 Rob. 356.

a. Summons to show cause, when proper. The Code further provides, that "in case of the death of a judgment debtor after judgment, the heirs, devisees, or legatees of the judgment debtor, or the tenants of real property owned by him and affected by the judgment may, after the expiration of three years from the time of granting letters testamentary, or of administration, upon the estate of the testator or intestate, be summoned to show cause

why the judgment should not be enforced against the estate of the judgment debtor in their hands, respectively, and the personal representatives of a deceased judgment debtor may be so summoned at any time within one year after their appointment." Code, § 376. By the term "judgment debtor," in this section of the Code, is meant, one against whom the judgment is conclusive and final; and where a joint debtor has not been served with process, but judgment in form is entered against him, under section 136 of the Code, he is not to be deemed as within the provisions of section 376: *Kellogg v. Olmsted*, 6 How. 487; *Foster v. Wood*, 30 id. 284; S. C., 1 Abb. N. S. 150.

b. Nature of summons. The summons required in the proceeding under consideration is peculiar in its nature, performing, in fact, the office of a complaint, as well as that of process strictly considered. It must contain a description of the judgment, which, in connection with the affidavit required, furnishes the defendant with all the information necessary to enable him to prepare his defense. The notice of relief demanded is also peculiar, for, as we have already seen, it assumes the form and answers the purposes of an order to show cause. See Code, §§ 375-377.

c. Form, contents and service of summons. The summons must be subscribed by the judgment creditor, his representatives or attorney; it must describe the judgment, and require the person summoned to show cause within twenty days after the service of the summons. It is served in like manner as the original summons. Code, § 377.

The form of the summons thus prescribed must be strictly and literally followed, and should, in no respect, be varied, nor should a notice of an application for further relief be added. See *Mills v. Thursby*, 12 How. 335; S. C., 2 Abb. 432.

It is unnecessary to specify in the summons the time or place to show cause, but the summons will not be vitiated by so doing. *Townsend v. Newell*, 14 Abb. 340. Defendants, against whom judgment has already been obtained, need not be named as defendants in the summons. *Johnson v. Smith*, 23 How. 444; S. C., 14 Abb. 421.

d. Affidavit of amount due. The summons must be accompanied by an affidavit of the person subscribing it, that the judgment has not been satisfied to his knowledge or information and belief, and must specify the amount due thereon. Code,

§ 378. The mode of service of the affidavit is not prescribed, but it must doubtless accompany the summons in its service as well as in its preparation, and, as in the case of a complaint, a copy may be held sufficient for the purpose. Where the case is, however, important, and likely to be contested, it would be the better practice to serve a duplicate original. See 2 Whit. Pr. 572.

e. Pleadings of party summoned. When the debtor is summoned under section 376 of the Code, he will be at liberty to deny the judgment, or to set up any defense which may have subsequently arisen to the judgment, such as payment, release, discharge in bankruptcy and the like, they all being defenses to the judgment. *Gibson v. Van Derzee*, 14 Abb. N. S. 111; Code, § 379. When he is proceeded against according to section 375, his range of defense is wider, and "he may make any defense which he might have made to the action, if the summons had been served on him at the time when the same was originally commenced and such defense had been then interposed to such action." *Ib.* See *Berlin v. Hall*, 48 Barb. 442; *Gibson v. Van Derzee*, 14 Abb. N. S. 111.

It is not competent for the defendant to demur, and the answer is, in form, an answer to the summons and affidavit. In its essential parts it is precisely the same as an answer to a complaint, and it should be verified in the like cases and manner as the answer in an action. Code, § 381.

f. Pleadings of judgment creditor. Upon the answer being served issue should be joined by the party issuing the summons by the service of a demurrer or reply to the answer. Code, § 380. A reply is unnecessary unless the answer sets up new matter. See *Mills v. Thursby*, 12 How. 385; S. C., 2 Abb. 432.

The party summoned may demur to the reply when it contains any thing beyond a mere denial. Code, § 380. The reply should be verified, subject to the same rules as the reply in an action. Code, § 381.

g. Issues, how tried. The issues when joined are brought to trial and tried in the same manner as in an action. Code, § 380.

h. Form of judgment. The Code provides that judgment may be given in the same manner as in an action (§ 380). Where a party is summoned under section 375 it will be the ordinary money judgment, or such other adjudication as may be proper. But under section 376 the judgment will be special. It must be taken strictly *in rem* as against the estate sought to be charged.

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in the hands of heirs, beneficiaries, or representatives, as the case may be. A personal judgment against parties standing in a representative capacity will be clearly improper. *Mills v. Thursby*, 11 How. 129; *Same v. Same*, 2 Abb. 432; S. C., 12 How. 385. Costs may be awarded, because the judgment may be given in the same manner as in an action. *Ib.* See Code, § 307, last clause of section.

If the time prescribed in the summons is suffered to elapse, and no cause is shown, the plaintiff, on the usual proof of service and that no answer has been received, should make application for judgment to the officer, and at the time and place mentioned in the summons; and the order for judgment may be taken by default, and as of course on the requisite proof. The application will be *ex parte*, and the entry of judgment will follow in the usual manner. See 2 Whit. Pr. 573.

ARTICLE IV.

SEPARATE JUDGMENTS.

Section 1. When a several judgment should be rendered. The application of the rule heretofore stated (*ante*, art. 3, § 1), to the effect that a several judgment may not be rendered where the interests of the defendants are strictly and technically joint, is of quite limited scope; and whenever such interests are several or severable in their nature the rule has no application, and separate judgment may be entered, either for or against any one or more, or against some and in favor of others of such defendants, according to the proof upon the trial. See Code, § 274.

The rule may be stated to be that, where there cannot be a joint judgment for damages against all the defendants, separate judgments may be pronounced, the power to do so being expressly given by the terms of sections 118 and 274 of the Code; and this power is constantly exercised by the courts, even in actions at law. *Gillilan v. Norton*, 33 How. 373; S. C., 6 Rob. 546.

As to the propriety of a separate judgment where the rights or liabilities of the parties are several there cannot exist the slightest doubt; and the only difficulty consists in the application of the rule in actions against several defendants as jointly liable. The different cases will be considered in the three following sections.

Section 2. On joint contracts. It was a well-settled rule at common law that, in an action against several defendants on an alleged joint contract, no recovery could be had against any of them unless a joint liability on a contract made by all of them was established. See *Mitchell v. Ostrom*, 2 Hill, 520. But this rule has been modified by the Code (§§ 136, 274), and where the plaintiff has in his complaint treated the indebtedness or liability as joint, a several judgment may nevertheless be entered if, upon the evidence given, a separate liability is shown. See *Quigley v. Walter*, 2 Sweeny, 175; *Fielden v. Lahens*, 6 Abb. N. S. 341; S. C., 3 Trans. App. 218; 33 How. 620 (*n*); *Pruyn v. Black*, 21 N. Y. (4 Smith) 300; *Brumskill v. James*, 11 N. Y. (1 Kern.) 294; *McGuire v. Johnson*, 2 Lans. 305; *Denman v. Prince*, 40 Barb. 213; *Witherhead v. Allen*, 28 id. 661; *Bonsteel v. Vanderbilt*, 21 id. 26; *People v. Cram*, 8 How. 151. And this is true not only in actions upon contract, but also in an action for a tort (*Ib.*; *Decker v. Gardiner*, 8 N. Y. [4 Seld.] 29; *Daniels v. Lyon*, 9 N. Y. [5 Seld.] 549; *Wagener v. Bill*, 19 Barb. 321; *Forsyth v. Edminston*, 11 How. 408; *Montfort v. Hughes*, 3 E. D. Smith, 591), and for the recovery of specific property. *Woodburn v. Chamberlin*, 17 Barb. 446.

The same rule has been held to be applicable to the case of co-plaintiffs, and the defendant, upon showing that one of several plaintiffs is the sole party in interest, may avail himself of a set-off, in all respects as if the action had been brought in the name of such plaintiff alone. *Cowles v. Cowles*, 9 How. 361. See *Palmer v. Davis*, 23 N. Y. (1 Tiff.) 242. So where an action is brought against two or more upon a joint contract, and an equitable defense peculiar to one defendant is set up by him, the court may give judgment for the plaintiff against the other defendants, and for the one defendant against the plaintiff. *Barker v. Cocks*, 50 N. Y. (5 Sick.) 689.

Section 3. On joint and several contracts. The test as to the propriety of a several judgment, in actions on joint and several contracts, is to be found in the answer to the question, whether the circumstances are in fact such that a several action might be brought against any party. See *De Ridder v. Schermerhorn*, 10 Barb. 638; *Brainard v. Jones*, 11 How. 569; *Harrington v. Higham*, 15 Barb. 524; *Parker v. Jackson*, 16 id. 33; *McIntosh v. Ensign*, 28 N. Y. (1 Tiff.) 169; *Quigley v. Walter*, 2 Sweeny, 175.

On a several contract alleged to be joint—Severing actions or parties.

Where, in any such action, one defendant only has been served, the plaintiff may, if he choose, proceed against him as if he were the sole defendant. *Stannard v. Mattice*, 7 How. 4. But the rule is otherwise if the defendants are liable jointly and not also severally. In the latter case the judgment must, in form, be entered against both defendants. *Ib.*

Section 4. On a several contract alleged to be joint. A plaintiff may recover against one of several defendants on a several contract, notwithstanding he has alleged in his complaint that it is joint (see *ante*, § 2); but an action against two defendants, upon a joint and several contract as joint, cannot be changed to an action upon it as several, unless one of the defendants is stricken from the record as a party, or has a defense personal to himself. See *Brown v. Richardson*, 4 Rob. 603; *Barker v. Cocks*, 50 N. Y. (5 Sick.) 689.

ARTICLE V.

SEVERING ACTIONS OR PARTIES.

Section 1. When judgment should be against some and in favor of other defendants. The cases in which judgment should be rendered against some, and in favor of other defendants, have already been noticed in the preceding article. The general rule is that, whenever, in an action against several defendants as jointly liable, it appears upon the trial that some of them are liable and others not, judgment should be awarded against the former and in favor of the latter. See *ante*, art. 4, §§ 1 and 2, and cases there cited.

Section 2. When judgment must be rendered in favor of some and against other defendants. The power conferred by section 274 of the Code, to render judgment for or against one or more of several defendants, is not discretionary; and a refusal to exercise such power in the proper cases is a ground of exception and appeal. See *Cowles v. Cowles*, 9 How. 361; *People v. Cram*, 8 *id.* 151; *Hubbell v. Meigs*, 50 N. Y. (5 Sick.) 480, 489.

ARTICLE VI.

JUDGMENT BETWEEN SEVERAL DEFENDANTS.

Section 1. Relief as between co-defendants, when granted. By the provisions of section 274 of the Code, the judgment in an

action "may determine the ultimate rights of the parties on each side as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled." But the court is not bound to make such determination without relief being asked on the trial. *Decker v. Judson*, 16 N. Y. (2 Smith) 439. And it seems that the only proper case in which defendants can have relief, against each other, is where they have appeared and answered, in reference to the claim made against them by the plaintiff, and as a part of the adjustment of that claim, and that it must be based upon the facts involved in and brought out by the litigation and investigation of that claim. See *Mechanics and Traders' Sav. Inst. v. Roberts*, 1 Abb. 381; *Woodworth v. Bellows*, 4 How. 24; S. C., 1 Code R. 129; *Norbury v. Seely*, 4 How. 73; S. C., 2 Code R. 47; *Kay v. Whittaker*, 44 N. Y. (5 Hand) 565.

Although there can be no doubt that the Code permits affirmative relief to be given to a defendant as against the plaintiff, yet, as between co-defendants, such relief will be given only in some peculiar cases and in order to do complete justice (see *Livingston v. Mildrum*, 19 N. Y. [5 Smith] 440; *Stephens v. Hall*, 2 Rob. 674), the courts being averse to making the exercise of the right general. *Tracy v. New York Steam Faucet Co.*, 1 E. D. Smith, 349; *Wells v. Smith*, 7 Abb. 261. And, when such relief is granted in an action for ordinary relief, the proper course seems to be to allow the parties between whom the controversy arises, to serve statements in the nature of pleadings between themselves. See *Decker v. Judson*, 16 N. Y. (2 Smith) 439; and see vol. 2, p. 476, *ante*. Under the former practice in chancery, when such relief was granted by and against defendants, it could only be on pleadings and proofs. *Renwick v. Macomb*, Hopk. 277; *Elliott v. Pell*, 1 Paige, 263; *Jones v. Grant*, 10 id. 348; *Conry v. Caulfield*, 2 Ball. & B. 255; *Chamley v. Dunsany*, 2 Sch. & Lef. 718. And such practice has been recognized as still in existence under the Code. See *Livingston v. Mildrum*, 19 N. Y. (5 Smith) 440.

ARTICLE VII.

RELIEF TO PLAINTIFF.

Section 1. In case of default. The Code makes an important distinction as to the measure of relief which may be granted to

In case of answer.

the plaintiff against a defendant who answers the complaint, and that which he may have against one who makes default. In the latter case the relief granted cannot exceed that which the plaintiff has demanded in his complaint. Code, § 275. And where the plaintiff in the complaint asked to have notes to the amount of \$5,000 delivered up and canceled, and to have a judgment for \$2,000, it was held that a judgment for \$7,000 exceeded the relief sought in the complaint, and the judgment was reversed. *Hurd v. Leavenworth*, 1 Code R. N. S. 278. So, in an action against several defendants to obtain a partition of certain premises, none of the defendants having answered, and the action having been referred, judgment was rendered on the referee's report for partition, and against one of the defendants for *rent*, it was held that, as the plaintiff's complaint did not ask for an accounting as to rents, he could not have such additional relief in the action. *Bullwinker v. Ryker*, 12 Abb. 311.

Section 2. In case of answer. On the other hand, when the defendant puts in an answer, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. Code, § 275. This provision of the Code is in conformity to the former equity practice, where the complaint contained a general prayer for relief. (*Boardman v. Davidson*, 7 Abb. N. S. 439); and the plaintiff may be allowed any judgment to which, upon the allegations and proof, he is entitled, either at law or in equity (*See v. Partridge*, 2 Duer, 463; *New York Ice Co. v. Northwestern Ins. Co.*, 23 N. Y. [9 Smith] 357; *Armitage v. Pulver*, 37 N. Y. [10 Tiff.] 494; S. C., 5 Trans. App. 186; *Jones v. Butler*, 20 How. 189; S. C., 30 Barb. 641), even though the complaint contains no prayer for general relief. *Emery v. Pease*, 20 N. Y. (6 Smith) 62.

So, if the case which the plaintiff states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled. *Ib.* See *Marquat v. Marquat*, 12 N. Y. (2 Kern.) 336; *Barlow v. Scott*, 24 N. Y. (10 Smith) 40. See *Cowenhoven v. City of Brooklyn*, 38 Barb. 9; *Stevenson v. Buxton*, 15 Abb. 352; *Von Beck v. Village of Rondout*, 15 id. 48; *Coleman v. Second Avenue R. R. Co.*, 38 N. Y. (11 Tiff.) 201; S. C., 6 Trans. App. 146; affirming S. C., 48 Barb. 371; *Craig v. Hyde*, 24 How. 313; *Rome Exchange Bank v. Eames*, 1 Keyes, 588; *Baily v. Ryder*, 10 N. Y. (6 Seld.) 363.

Relation of relief to complaint.

Section 3. Relation of relief to complaint. In order to determine the rights and liabilities of the parties to an action under the Code, the pleadings are to be liberally construed (*Miller v. White*, 57 Barb. 504; S. C., 8 Abb. N. S. 46; *Conaughty v. Nichols*, 42 N. Y. [3 Hand] 83; *Lyon v. Isett*, 42 How. 155; S. C., 11 Abb. N. S. 353); and it is sufficient, if facts be stated in the complaint which warrant the judgment, although the grounds upon which the judgment was rendered were other than those evidently contemplated by the pleader. See *Ib.*; *Wright v. Hooker*, 10 N. Y. (6 Seld.) 51; *Barker v. Clark*, 12 Abb. N. S. 106.

No trouble need arise as regards the form of the action, whether it be on the case or on contract; for if the facts stated in the complaint give a right of action, the plaintiff can recover on that complaint. *Scott v. Pilkington*, 15 Abb. 280; *Butterworth v. O'Brien*, 24 How. 438; S. C., 39 Barb. 192; *Read v. Lambert*, 10 Abb. N. S. 428. Nor need the complaint be artistically drawn. *Ib.*; *Wood v. Brown*, 34 N. Y. (7 Tiff.) 337; *Emery v. Pease*, 20 N. Y. (6 Smith) 62. But in order to recover the plaintiff must establish his allegations by proof on the trial. *Salter v. Ham*, 31 N. Y. (4 Tiff.) 321.

Where the complaint prays for a specific performance, or, in the event that cannot be compelled, for damages, the court will entertain the case and award damages if performance cannot be enforced. *Marquat v. Marquat*, 12 N. Y. (2 Kern.) 336; reversing S. C., 7 How. 417; *Greason v. Keletas*, 17 N. Y. (3 Smith) 491; *Barlow v. Scott*, 24 N. Y. (10 Smith) 40; *Woodward v. Harris*, 2 Barb. 439; *Wiswall v. McGown*, *id.* 270. But if the allegations in the complaint do not make a case for a specific performance, but for damages, and the plaintiff fails in obtaining judgment for the latter, he cannot have judgment for the former on the evidence merely. *Towle v. Jones*, 1 Rob. 87; S. C., 19 Abb. 449; *Ryder v. Jenny*, 2 Rob. 56; *Craig v. Hyde*, 24 How. 313; *Stevenson v. Buxton*, 15 Abb. 352; reversing S. C., 8 *id.* 414. See *Mills v. Van Voorhies*, 20 N. Y. (6 Smith) 412; S. C., 10 Abb. 152.

In an action to recover back money obtained under fraudulent representations it is no objection to the success of the action that the fraud is not proved, if it appears that there should be a recovery as for money had and received. *Byzbie v. Wood*, 24 N. Y. (10 Smith) 607.

ARTICLE VIII.

RELIEF TO DEFENDANT.

Section 1. Affirmative relief. The court may, in giving judgment, grant to the defendant any affirmative relief to which he may be entitled. Code, § 274. But this provision of the Code is inapplicable to cases in which a complete determination of the controversy presented by the answer, and upon which the relief is demanded, cannot be had without the presence of other parties. See *Smith v. Howard*, 20 How. 151; *Cummings v. Morris*, 25 N. Y. (11 Smith) 625. And if a defendant only asks that the complaint be dismissed, it is too late to ask other relief on appeal. *Garvey v. Jarvis*, 54 Barb. 179.

When affirmative relief, legal or equitable, is claimed by the defendant, the duty of bringing the cause to trial devolves upon him unless the plaintiff himself brings it on by notice. *Roy v. Thompson*, 8 How. 253; S. C., 1 Duer, 636. Otherwise only a dismissal of the complaint can be had. *Ib.* Thus, in an action for the recovery of personal property it was held that the defendant, after issue joined, could not move for a dismissal of the complaint and at the same time for judgment for a return of the property. If he wishes judgment, he must notice the cause for trial. *Potter v. Davison*, 8 Abb. 43; *Wilson v. Wheeler*, 1 Code R. N. S. 402; S. C., 6 How. 49.

Section 2. Relations between pleadings and relief. The right of the defendant to affirmative relief must appear by the pleadings as well as the evidence, if any; and a judgment cannot be given in his favor for a cause of action not set up by way of defense or counter-claim. *Garvey v. Jarvis*, 54 Barb. 179; *Wright v. Delafeld*, 25 N. Y. (11 Smith) 266. Thus, where suit was commenced by the plaintiff to stay proceedings at law in actions upon several promissory notes, and upon the defendant successfully defending on a pure defense, the court, besides dismissing the complaint, also gave judgment for *specific performance* by the plaintiff, it was held that, as the answer was a pure defense, the court below properly dismissed the complaint, but improperly rendered *other* judgment on the pleadings in the case. *Ib.*

But where it appeared in evidence that the defendant was entitled to specific performance of a contract by the plaintiff, it was

Divorce — Legal and equitable relief.

held that judgment to that effect might properly be given in favor of the defendant, although the defense set up did not claim affirmative relief. *Cythe v. La Fontain*, 51 Barb. 186.

Where an action was brought to annul an executory contract for a lease, on the ground of fraud, and the defendant set up a counter-claim for rent, it was held, that the cause of action being unsustained, the defendant might have judgment for his rent. *Mayor, etc., of New York v. Wood*, 4 Abb. N. S. 332.

Section 3. Divorce. It seems that the defense of adultery cannot be interposed as a ground for affirmative relief in an action for a divorce *a mensa et thoro*, but in such an action, where the facts alleged in the complaint were disproved, and the answer, setting up the general bad conduct of the plaintiff, was substantiated, it was held, that the defendant was entitled to a judgment of divorce *a mensa et thoro*. *McNamara v. McNamara*, 2 Hilt. 547; S. C., 9 Abb. 18.

ARTICLE IX.

LEGAL AND EQUITABLE RELIEF.

Section 1. In general. The Code having abolished all distinction between legal and equitable actions (See § 69), the necessity of bringing two actions, one at law and one in equity, in relation to the same matter, no longer exists, and the same relief is to be granted in one action that would formerly have been granted only through the medium of two actions. *Foot v. Sprague*, 12 How. 355; *Blair v. Claxton*, 18 N. Y. (4 Smith) 529; *Phillips v. Gorham*, 17 N. Y. (3 Smith) 270; *Crary v. Goodman*, 12 N. Y. (2 Kern.) 266; *Dobson v. Pearce*, id. 156; S. C., 1 Abb. 97; *Laub v. Buckmiller*, 17 N. Y. (3 Smith) 620; *McHenry v. Hazard*, 45 N. Y. (6 Hand) 580. See *Cramer v. Benton*, 4 Lans. 291; S. C., 60 Barb. 216; *Cole v. Reynolds*, 18 N. Y. (4 Smith) 529; *Gridley v. Gridley*, 24 N. Y. (10 Smith) 130. Nor can the plaintiff be required to give a name to his action, but he may demand more than one kind of relief, and if the facts stated are such as may constitute one of two actions, which is the proper one is to be determined on the trial. *Hall v. Hall*, 38 How. 97.

In every species of action under the Code, such judgment is to be granted as, taking into consideration all the principles of law and equity applicable to the case, may be proper. *New York Central Ins. Co. v. Nat. Pro. Ins. Co.*, 14 N. Y. (4 Kern.) 85.

"The question is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or an equitable defense against the plaintiff's claim; but whether, according to the whole law applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for." *Crary v. Goodman*, 12 N. Y. (2 Kern.) 266. See *New York Ice Co. v. Northwestern Ins. Co.*, 21 How. 296; S. C., 12 Abb. 414; 23 N. Y. (9 Smith) 357; *Barlow v. Scott*, 24 N. Y. (10 Smith) 40; *Emery v. Pease*, 20 N. Y. (6 Smith) 62; *Despard v. Walbridge*, 15 N. Y. (1 Smith) 374.

ARTICLE X.

JUDGMENT ON DEMURRER.

Section 1. Where demurrer is overruled. See "Decision on Issue of Law," (*ante*, 596, art. 2, § 3,) where the rules relating to judgment on demurrer are stated in full, and the cases bearing on the subject collected together.

Section 2. Where demurrer is sustained. See *ante*, 596, art. 2, § 3.

Section 3. Final judgment against plaintiffs. In a case in which the answer of the defendant is sufficient to constitute a *bar* to the action, and it is demurred to, and the demurrer is overruled, the proper judgment to be entered is a final judgment to the effect that the plaintiff take nothing by his complaint and that the same be dismissed. And this is the rule, although there may be issues of fact joined in the cause. *Wightman v. Shankland*, 18 How. 79.

Section 4. Final judgment against defendant. But final judgment cannot be perfected against a defendant on an issue of law, where there are issues of fact undisposed of. In such case the decision merely remains an order, from which the losing party is entitled to an appeal to the general term, but not to the court of appeals, and the party succeeding must await the determination of the issues of fact before he can enter and perfect final judgment on the whole record. *Paddock v. The Springfield Fire and Marine Insurance Co.*, 12 N. Y. (2 Kern.) 591; *Adams v. Fox*, 27 N. Y. (13 Smith) 640. See *Ferris v. Aspinwall*, 10 Abb. N. S. 137; *Harris v. Clark*, 4 How. 78; *Ford v. David*, 3 Abb. 385; *The People v. Haws*, 34 Barb. 69; S. C., 21 How. 178; 12 Abb. 204.

ARTICLE XI.

JUDGMENT ON FRIVOLOUS OR FALSE PLEADING.

Section 1. What judgment may be given on frivolous pleading. If a demurrer, answer or reply be frivolous, the party thereby prejudiced may make application to a judge of the court, either in or out of the court, and judgment may be given accordingly. Code, § 247. Under this section of the Code, a judge at chambers has the same power as at special term, and may make either an absolute or a conditional order for judgment, on account of the frivolousness of a pleading. *Witherspoon v. Van Dolar*, 15 How. 266; *Witherhead v. Allen*, 28 Barb. 661. And it seems that a motion for judgment on overruling frivolous defenses, under this section, may, in a proper case, be combined with a motion to strike out sham and irrelevant defenses under section 152, and a motion for expunging irrelevant and redundant matter under section 160 of the Code. See *ante*, vol. 2, 494. In such case the party making application assumes, however, the risk of having his motion denied if he asks what ought not to be granted, and of having to pay costs if he asks too much. *People v. McCumber*, 15 How. 186; S. C., 27 Barb. 632; S. C. affirmed, 18 N. Y. (4 Smith) 315.

Although it is the better practice for the party making application for judgment to state the grounds upon which it is made, yet the notice of motion need not necessarily specify which of the defenses are claimed to be sham or irrelevant, and which frivolous. *Bailey v. Lane*, 13 Abb. 354. See *ante*, vol. 2, 494.

When judgment is given, under section 247 of the Code, the frivolous pleading is not stricken out, but remains upon the record and becomes a part of the judgment roll. *Fettretch v. McKay*, 47 N. Y. (2 Sick.) 426; S. C., 11 Abb. N. S. 453; *People v. McCumber*, 18 N. Y. (4 Smith) 315; *Briggs v. Bergen*, 23 N. Y. (9 Smith) 162. And the court has no power to order judgment upon a part of an answer as frivolous where there is a part which is held good. But, if part of the answer is irrelevant, it may be stricken out as such, under section 152, on a motion for judgment for frivolousness, if there is a prayer in the notice of motion for "other or further relief." *Thompson v. The Erie*

Nature and effect of decision — What judgment may be given on a false pleading.

R. R. Co., 45 N. Y. (6 Hand) 468. See *Hecker v. Mitchell*, 6 Duer, 687; S. C., 5 Abb. 453.

Section 2. Nature of decision. A decision of the court, or of a judge at chambers, under section 247 of the Code, upon the frivolousness of a demurrer, is a judgment upon an issue of law and not an order simply. *King v. Stafford*, 5 How. 30; *Bentley v. Jones*, 4 id. 335; S. C., 3 Code R. 37; *Roberts v. Morrison*, 7 How. 396; 11 N. Y. Leg. Obs. 61; *Bruce v. Pinckney*, 8 How. 397; *Lewis v. Acker*, id. 414. An appeal may, however, be now taken from such decision as an order, if brought within the time allowed by section 349 of the Code. If not brought within such time, and judgment be entered, then it can only be appealed from as a judgment. *Lee v. Ainslie*, 4 Abb. 463; S. C., 1 Hilt. 277; *Witherhead v. Allen*, 28 Barb. 661. See *ante*, vol 2, 496.

Section 3. Effect of decision. Where judgment is ordered for the plaintiff, on a frivolous answer or demurrer, he takes judgment in the same manner as if no answer or demurrer had been put in, where there is no other issue. *King v. Stafford*, 5 How. 30; *Saltus v. Kipp*, 5 Duer, 646; S. C., 12 How. 342; 2 Abb. 382. See *Aymar v. Chase*, 1 Code R. N. S. 141; and see *ante*, vol. 2, 496.

Section 4. What judgment may be given on a false pleading. It is provided by section 152 of the Code, that "sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may, in their discretion, impose." No new power is conferred by this section of the Code, but its provisions are merely declaratory of that power which the court formerly possessed, to prevent the perversion of the forms of presenting defenses. *Wayland v. Tysen*, 45 N. Y. (6 Hand) 281; *Manufacturers' Bank of Rochester v. Hitchcock*, 14 How. 406. The court has no power to strike out, as sham, an answer consisting of a general denial of the material allegations of the complaint (*Wayland v. Tysen*, 45 N. Y. [6 Hand] 281); nor does the above section (152) authorize the striking out of the whole or part of an answer as redundant (*Fasnacht v. Stehn*, 5 Abb. N. S. 338; S. C., 53 Barb. 650), or part of an entire answer or separate defense as sham. The whole must be stricken out or none. *Winslow v. Ferguson*, 1 Lans. 436. See *ante*, vol. 2, p. 489.

A sham answer is one which is false. *Fettretch v. McKay*, 47 N. Y. (2 Sick.) 426; S. C., 11 Abb. N. S. 453; *Littlejohn v.*

Greeley, 22 How. 345; S. C., 13 Abb. 311; *Hadden v. N. Y. Silk Manuf'g Co.*, 1 Daly, 388; *Kreitz v. Frost*, 5 Abb. N. S. 277; *Leach v. Boynton*, 3 Abb. 1. And an answer may be stricken out as sham if it is untrue in fact, although the defendant believed the allegations to be true, his ignorance of their untruth being immaterial. *Roome v. Nicholson*, 1 Sweeny, 525; S. C., 8 Abb. N. S. 343.

Section 5. Effect of judgment. Where the answer has been stricken out as sham and irrelevant, the proper method of obtaining judgment is to proceed as though no answer had been put in. *Aymar v. Chase*, 1 Code R. N. S. 141; *De Forest v. Baker*, 1 Rob. 700; S. C., 1 Abb. N. S. 34. See *ante*, vol. 2, p. 492.

Section 6. What judgment may be rendered on a pleading false in part and frivolous in part. It seems that, in a proper case, judgment may be rendered on a pleading false in part and frivolous in part. Thus it has been held that, under proper restrictions, the practice would not be censurable to combine in one a motion to strike out sham and irrelevant defenses, for judgment on overruling frivolous defenses, for expurgating irrelevant and redundant matter, and for a compulsory amendment of indefinite allegations. See *People v. McCumber*, 27 Barb. 632; S. C., 15 How. 186; 18 N. Y. (4 Smith) 315; see, also, *ante*, 612, § 1; *ante*, vol. 2, p. 495.

ARTICLE XII.

JUDGMENT ON ADMITTED DEMAND.

Section 1. What judgment may be rendered. Where the defendant, by his answer, in any such action as is described in section 246 of the Code, subdivision 1, shall not deny the plaintiff's claim, but shall set up a counter-claim amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of his claim over the defendant's counter-claim. Code, § 246. And in such case the plaintiff may enter judgment for the balance, without any assessment by the clerk. *Robbins v. Watson*, 22 How. 293. See *ante*, vol. 2, p. 519.

ARTICLE XIII.

STIPULATION FOR JUDGMENT.

Section 1. Parties compelled to abide by. In a case where judgment has been entered up as the result of a verbal agreement between the attorneys for the respective parties, the performance of the terms of such agreement by the parties will be compelled by the court. The rule requiring stipulations or agreements of this kind to be in writing has no application, where an advantage has been obtained by the one party in consequence of the other's reliance on the arrangement, and especially where the agreements have been executed by passing into a judgment. *Montgomery v. Ellis*, 6 How. 326. See *Kelly v. Thayer*, 34 How. 163.

CHAPTER III.

FORM AND CONTENTS, IN GENERAL.

ARTICLE I.

GENERAL FORM OF JUDGMENTS.

Section 1. Essentials of a judgment. It is essential that every judgment should clearly show what is adjudged, the parties between whom judgment is pronounced, and by what tribunal the judgment is rendered. This is all that is absolutely necessary, but for the sake of giving form to the judgment it is usual to follow the divisions of the equity decree, under the former practice in chancery. This, in general, consisted of three parts: 1. The caption and title; 2. The reciting part; and, 3. The ordering part; to which was sometimes added the declaratory part, which, when used, generally preceded the ordering part. See 1 Barb. Ch. Pr. 337. It should be remembered that it is the substance only of the old forms that has been preserved in the present practice, and that but little regard is now paid to the strict formal divisions as above given.

The practice of giving the reason for a judgment in writing is said to be of comparatively modern origin; and it is wholly in the discretion of the court whether or not it give an opinion upon pronouncing judgment, and if given whether it be oral or in writing. *Houston v. Williams*, 13 Cal. 24.

Section 2. Title and caption. The title of the judgment should give the general description of the court, and should set forth the names of the parties, plaintiffs and defendants, in full.

The caption is not an essential part of the judgment, although it is common in practice to insert one. It should state the term of the court at which the judgment was ordered, the place at which it was actually held, and the date at which it was actually entered. See Old Chancery Rule 98; *Barclay v. Brown*, 7 Paige, 245; *Whitney v. Belden*, 4 id. 140. And where it is ordered to be entered *nunc pro tunc*, as of a previous date or otherwise, the fact should be stated, and the time of actual entry must appear in some part of the judgment. *Barclay v. Brown* 7 Paige, 245.

Recitals — Mandatory parts.

A judgment upon the report of a referee is to be entered, in form, as if pronounced by the court before one of its justices at special term. *Hancock v. Hancock*, 22 N. Y. (8 Smith) 568. If the judgment is taken by default, without application to the court, the caption may either state the judgment as of a special term held that day, naming the judge sitting at that term, or this may be wholly omitted and the date and place of entry of judgment simply given. 2 Till. & Shear. Pr. 694.

Section 3. Recitals. Under the present practice recitals are purely matters of form, and are only made in a judgment in the most general way, and even under the former practice in chancery were not regarded as necessary; it being intended, where the cause was set down for hearing, that it was regularly done, unless the party attempting to impugn the decree showed the contrary. *Quarrier v. Carter*, 4 Hen. & Munf. 242.

Where judgment is for the defendant the recitals may be of importance, as showing whether or not it ought to bar a new action for the same cause of action. And it should appear in such judgment whether the cause was decided upon the merits, whether it was submitted to the jury if any, or whether the complaint was dismissed without any conclusive decision of the controversy. The recitals are conclusive evidence against a party in the action, who makes no motion to correct them. *Chemung Canal Bank v. Judson*, 8 N. Y. (4 Seld.) 254.

Section 4. Mandatory part. This part of the judgment, which corresponds to the ordering and declaratory part of the equity decree, constitutes *the judgment* properly speaking, and it must specify clearly the relief granted or other determination of the action. Code, § 280.

The ordering or mandatory clause of the equity decree commenced as follows: "It is therefore ordered, adjudged and decreed, and this court, in virtue of the power therein vested, doth order, adjudge and decree." 1 Barb. Ch. Pr. 338. Under the Code the word "decree" is omitted, and the term "judgment" substituted. The usual form of the ordering part, therefore, is "It is adjudged," etc.; and this is proper to be used either in the ordering or in the declaratory part of the judgment. 1 Van. Santv. Eq. Pr. 586.

Judgment for plaintiff.

ARTICLE II.

JUDGMENT FOR PLAINTIFF.

Section 1. On failure to answer summons personally served.

Judgment on failure to answer.

SUPREME COURT.

A. B., plaintiff,
 agst.
C. D., defendant.

} *Judgment,* 187
 at h. m. M.

The summons, with a copy of the complaint in this action, having been personally served on _____, the *defendant*, more than twenty days previous hereto, exclusive of the day of service, and no answer or demurrer to the complaint having been served on the *plaintiff attorney*, as required by the summons;

Now on motion of _____, *plaintiff attorney*, it is hereby adjudged that, etc.

The above form contains merely the recitals proper for judgments taken under this section. The ordering or mandatory parts of the judgment will be given under the appropriate heads relating to the various kinds of relief.

Section 2. Judgment on failure to answer, summons served by publication.

(Title of cause.)

(Caption.)

The summons in this action having been ordered to be served by publication, and the time prescribed by the order for publication against the defendant (*or defendants, naming them, and if the service has been made on different defendants on different days, specify the times of each.*) having expired on the day of _____, 18____, and due proof having been given to the court of such service, and that no answer (*or notice of appearance*) has been received from the defendant (*or defendants, naming them*), and of the demand mentioned in the complaint (and the plaintiffs having filed, as required, satisfactory security to abide the order of the court touching the restitution, etc., *as specified in the third subdivision of section 246 of the Code of Procedure*), it is now, on motion of E. B., counsel for the _____, adjudged that (etc.).

Judgment on admitted demand, demurrer, etc. — Judgment for defendant.

Section 3. Judgment on admitted demand.

(*Title of cause.*)

(*Caption.*)

The plaintiff having filed with the clerk a statement, admitting the counter-claim contained in the answer of the defendant (*or* defendants, *naming them*), it is now, on motion of (*etc.*), adjudged that the plaintiff recover of the defendant (*or* defendants, *naming them*), dollars, being the excess of the plaintiff's claim over the said counter-claim, with dollars costs of the action, making together dollars.

Section 4. Judgment on demurrer.

(*Title of cause.*)

(*Caption.*)

This action having been brought to trial upon the issue of law arising upon the complaint and demurrer thereto (*or* complaint, answer and demurrer to the answer, *or* complaint, answer, reply and demurrer to the reply), and it appearing to the court that the is entitled to judgment upon the said demurrer, it is now, etc., (*inserting such clauses as are appropriate to the peculiar judgment pronounced.*)

Section 5. Judgment on a verdict.

(*Title of cause.*)

(*Caption.*)

This action having been brought to a trial by a jury, and a verdict therein rendered for the , it is now, on motion of (*etc.*), adjudged that (*etc.*).

Section 6. Judgment on a report of referee.

(*Title of cause.*)

(*Caption.*)

This action having been referred by an order dated (*etc.*) to , of , to hear and decide all the issues therein, and the report of the said referee being filed, it is now, on motion of (*etc.*), adjudged that (*etc.*).

ARTICLE III.

JUDGMENT FOR DEFENDANT.

Section 1. On dismissal of complaint. Under the former practice at law a nonsuit did not constitute a bar to a new action, but a decree in equity, dismissing a bill upon its merits, was conclusive until reversed, and was a good plea in bar to a second bill for relief on the same subject-matter. See *Holmes v. Remsen*,

Form of judgment dismissing complaint for want of service.

7 Johns. Ch. 286; *Lansing v. Russell*, 13 Barb. 510; S. C., 2 N. Y. (2 Comst.) 563; 4 How. 213; 2 Code R. 138; *Ogsbury v. La Farge*, 2 N. Y. (2 Comst.) 113; *Burhans v. Van Zandt*, 7 N. Y. (3 Seld.) 523. The Code having substituted a dismissal of the complaint for the former nonsuit, it was at first a question as to whether a dismissal did not amount to a bar in all kinds of actions; but it is now settled that the judgment of dismissal of the complaint in actions of a legal nature, when granted in lieu of a nonsuit, does not bar another action. *Coit v. Bland*, 12 Abb. 462; S. C., 33 Barb. 357; 22 How. 2; *Dexter v. Clark*, id. 289; S. C., 35 Barb. 271; *Wheeler v. Ruckman*, 7 Rob. 447; S. C., 35 How. 350; *Harrison v. Wood*, 2 Duer, 50; *Mechanics' Banking Association v. Mariposa Co.*, 7 Rob. 225. See *Vaughan v. O'Brien*, 57 Barb. 491; S. C., 39 How. 515. This rule, however, seems to be inapplicable to actions of an equitable nature, and, in such actions, a judgment of dismissal is held to be a bar. See *Coit v. Bland*, 12 Abb. 462; S. C., 33 Barb. 357; 22 How. 2; *Bostwick v. Abbott*, 16 Abb. 417; S. C., 40 Barb. 331.

Judgment may be rendered in favor of the defendant, either by a conclusive adjudication on the merits of the controversy between the parties, or the plaintiff may be simply turned out of court with the liberty to renew his action at a future time.

Form of judgment dismissing complaint for want of service.

(*Title of cause.*)

(*Caption.*)

This action having been commenced by the service of the summons, without a copy of the complaint, on the defendant (*or* defendants, *naming those in whose favor the dismissal is taken*), and the said defendant (*or*, the said defendants) having, on the day of _____, 18____, served on the plaintiff's attorney a notice of appearance, and demanded a copy of the complaint, and due proof having been given to the court of such notice and demand, and that no copy of the complaint has been served, it is now, on motion of (etc.), ADJUDGED that the complaint be dismissed for want of service of a copy thereof, and that the defendant (*or*, the said defendants) recover of the plaintiff dollars costs of the action.

Section 2. On failure to reply.

(*Title of cause.*)

(*Caption.*)

The defendant having answered the complaint in this action, setting up a counter-claim (*or*, and the plaintiff having been required by order of the court to reply to the same), and due

Judgment on the merits — Between defendants — For damages or money.

proof having been given to the court of the service of such answer (and order) on the plaintiff on the day of , 18 , and that no reply has been received from the plaintiff, it is now, on motion of (etc.), ADJUDGED that the defendant recover dollars, being the excess of his counter-claim over the plaintiff's claim, with dollars costs of the action, making together dollars (or, that the complaint be dismissed, and that the defendant recover dollars, costs of the action).

Section 3. Judgment on the merits.

Form of judgment upon, after a verdict.

(*Title of cause.*)

(*Caption.*)

This action having been brought to a trial by jury, and a verdict having been found for defendant (or defendants, *naming them*) it is now, on motion of , counsel for defendant, ADJUDGED that the complaint be dismissed upon the merits of the action, and that the defendant (or the said defendants) recover of the plaintiff dollars costs of the action.

ARTICLE IV.

JUDGMENTS BETWEEN DEFENDANTS.

See principles relating to, *ante*, 605, chap. 2, art. 6.

ARTICLE V.

JUDGMENTS FOR DAMAGES OR MONEY.

Section 1. Form of judgment for money. There should be but one judgment for money in any action. And where, on a recovery of a money demand by the plaintiff, the defendant is entitled to costs, the costs should be set off against the plaintiff's recovery, and but one judgment rendered for the balance in favor of the party to whom the balance is due. The Code does not authorize two judgments in such a case between the same parties, one for the plaintiff for his debt, and another for the defendant for his costs. *Johnson v. Farrell*, 10 Abb. 384; *Crim v. Cronkhite*, 15 How. 250; *Canfield v. Gaylord*, 12 Wend. 236.

Judgment for plaintiff for damages, and for defendant for costs.

The form of the judgment may be as follows :

I. Recite proceedings and verdict, decision, or report, as in forms, ante, articles 2, 3, continuing: And it appearing that

Judgment against joint debtors and in actions for lands.

this action, being one of which a court of justice of the peace has jurisdiction, the plaintiff is not entitled to costs (*or* the plaintiff not having recovered so much as fifty dollars, he is not entitled to costs), and the defendant is entitled to costs against the plaintiff;

It is ADJUDGED, that the plaintiff recover of the defendant dollars, his damages so found (*or* assessed); and that the defendant be allowed his costs of this action, amounting to dollars; and that the defendant, after deducting said sum of (*damages*) from said sum of (*costs*), do recover of the plaintiff, and have execution for the sum of dollars, the residue of said costs.

Judgment for money, common form.

(*Title of cause.*)

(*Caption.*)

(*Recitals as in articles 2, 3, ante.*)

It is now, on motion of , counsel for the , adjudged that the recover of the , dollars, with dollars costs of the action, making together dollars.

Section 2. Judgment against joint debtors.

Form of judgment against defendants jointly indebted on contract; where all are not served.

(*Title of cause.*)

(*Caption.*)

(*Same as last form, and continuing:*) but this judgment can only be enforced against the joint property of all the defendants, and the separate property (and persons) of the said (*naming the defendants served*), who were served as aforesaid.

ARTICLE VI.

JUDGMENTS IN ACTIONS FOR LANDS.

Section 1. For plaintiff. The judgment, in an action for land, if the plaintiff prevail, must be that the plaintiff recover the possession of the premises, according to the verdict of the jury, if there was such verdict; or, if the judgment be by default, according to the description of the premises contained in the complaint. 2 R. S. 308 (317), § 33. The judgment may also include such damages as are assessed by the verdict or otherwise.

Where the plaintiff's title has in any way terminated during the pendency of the action, whether by its own limitation or by the plaintiff's own act, judgment in his favor must be for costs and damages, but not for the land, as to which the defendant

Judgment in actions for chattels.

should be discharged. *Lang v. Wilbraham*, 2 Duer, 171; 2 R. S. 308 (317). See *Van Rensselaer v. Owen*, 48 Barb. 60; S. C., 33 How. 12.

Form of judgment for the recovery of possession, with damages, etc.

I. *Recitals of proceedings, and verdict, decision or report (same as in forms, ante, arts. 2, 3, continuing;)* therefore:

It is adjudged, that the plaintiff A. B. recover of the defendant C. D.* the possession of the real property described in the complaint (or, *if only a part is recovered*, the following described real property: *description*); and also the sum of dollars damages for the withholding thereof, together with dollars costs of this action, amounting in the whole to dollars.

Judgment for damages where plaintiff's title expired before trial.

I. (*Same as above, to the *, continuing:*) dollars damages for the withholding of the premises described in the complaint prior to the day of , when the plaintiff's title expired (and also dollars for the rents and profits thereof), and dollars costs of this action, making together the sum of dollars. And that as to the premises claimed, it is ADJUDGED that the defendant go thereof without day.

ARTICLE VII.

JUDGMENT IN ACTION FOR CHATTELS.

Section 1. For plaintiff. In an action to recover the possession of personal property judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof, in case a delivery cannot be had, and of damages for the detention. Code, § 377. Under this provision of the Code, where the action is brought to recover possession of specific personal property, if it has not been delivered to the plaintiff, the judgment must be in the alternative. In such case the plaintiff cannot elect to take judgment for the value of the property absolutely. *Wood v. Orser*, 25 N. Y. (11 Smith) 348; *Fitzhugh v. Wiman*, 9 N. Y. (5 Seld.) 559. A judgment which should, however, be in the alternative, but is absolute, is not void, but is valid until reversed or amended. *Livingston v. Hammer*, 7 Bosw. 670; *Gallarati v. Orser*, 4 id. 94. See S. C., 27 N. Y. (13

Form of judgment for recovery of possession.

Smith) 324; *Ingersoll v. Bostwick*, 22 N. Y. (8 Smith) 425; *Johnson v. Carnley*, 10 N. Y. (6 Seld.) 570.

Section 2. For defendant. Where the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. Code, § 277.

It is also necessary that this judgment be in the alternative form, and the defendant is not at liberty to elect to take judgment for the value only. *Dwight v. Enos*, 9 N. Y. (5 Seld.) 470; *Glann v. Younglobe*, 27 Barb. 480; *Seaman v. Luce*, 23 id. 240.

Form of judgment for recovery of possession.

(*Recite proceedings and verdict, decision or report, as in forms, ante, arts. 2, 3, continuing:*) and the value of the property claimed (and damages for the detention thereof), having been assessed at dollars by the jury (*or*, by a sheriff's jury by the direction of the court, *or*, by said referee):*

Therefore, it is now, on motion of , counsel for the , adjudged that the plaintiff (*or*, defendant) recover of the (defendant) the possession of the personal property described in the complaint (*or*, the following described personal property—*description*), *or*, dollars, the value thereof, in case a delivery of said property cannot be had; and, also, that he recover (dollars damages, together with) dollars costs of this action, amounting in the whole to dollars.

For confirmation of possession.

(*Same as the preceding form to the *, continuing:*) And the property claimed having been taken into the possession of the plaintiff (*or* defendant), therefore:

It is ADJUDGED that the plaintiff (*or* defendant) have and retain possession of the personal property described in the complaint (and also recover dollars damages), together with dollars costs of this action, amounting in the whole to dollars.

The judgment is the same, even where the successful party is a mere lienor (*Dows v. Rush*, 28 Barb. 157), unless the opposite party is the general owner, in which case, if the latter is in possession, the proper form of judgment in favor of the lienor is that he recover possession, or if that cannot be had then the value, not exceeding the amount due to him under his lien. *Seaman*

Judgments for special relief.

v. Luce, 23 Barb. 240; *Fitzhugh v. Wiman*, 9 N. Y. (5 Seld.) 559. See *Dows v. Greene*, 24 N. Y. (10 Smith) 638, 646.

Where the property has not been taken from the defendant during the litigation, the judgment in his favor is in the ordinary form for costs only.

ARTICLE VIII.

JUDGMENTS FOR SPECIAL RELIEF.

Section 1. In foreclosure. In a case in which there is no answer, the relief granted to a plaintiff cannot exceed that which is specifically demanded in the complaint; and a judgment entered which grants to the plaintiff relief not so demanded is void as unauthorized. *Bullwinker v. Ryker*, 12 Abb. 311; *Simonson v. Blake*, id. 331; S. C., 20 How. 484. See *Grant v. Van Dercook*, 8 Abb. N. S. 455; S. C., 57 Barb. 165. Under this rule a judgment in foreclosure for a deficiency, where the complaint only asked for a sale, is unauthorized and should be vacated on motion. *Simonson v. Blake*, 12 Abb. 331; S. C., 20 How. 484.

Where the decree in a foreclosure action reserves something for the court to *judicially* determine, such decree or judgment is to be regarded as *interlocutory* merely, from which no appeal will lie to the court of appeals (*Morris v. Morange*, 4 Abb. N. S. 447; S. C., 6 Trans. App. 1; 38 N. Y. [11 Tiff.] 172. See *Clark v. Brooks*, 2 Abb. N. S. 385, 405; S. C., 2 Daly, 159); but the usual decree for a sale in such action, directing the premises to be sold by the sheriff and a judgment to be docketed by the clerk for any deficiency that may arise is, before the execution of the decree, a "final judgment" within the provisions of the Code as to appeals. *Ib.* And an objection to a judgment in foreclosure that the court rendering final judgment in the case was not composed of the same judges who rendered the preliminary judgment, ascertaining and settling the rights of the parties and ordering judgment, is without force. *Howard v. Freeman*, 3 Abb. N. S. 292; S. C., 7 Rob. 25; *Chamberlain v. Dempsey*, 36 N. Y. (9 Tiff.) 144; S. C., 1 Trans. App. 257; reversing S. C., 9 Bosw. 540; S. C., 15 Abb. 1.

A judgment under an action to foreclose a mortgage which, at the same time, forecloses mortgages prior to that upon which the action was brought is irregular, and may be opened upon motion.

Judgment of foreclosure and sale.

of the prior mortgagee. The prior mortgagee may, however, foreclose subsequent mortgages, because they are taken as security by the junior incumbrancer, subject to such right of the former to foreclose; but the rights of the parties in this respect cannot be reversed, except with the express assent of the prior incumbrancer. *McReynolds v. Munns*, 2 Keyes, 214.

The court has no authority, in an action to foreclose a mortgage, to render a contingent personal judgment against some of the defendants before final judgment of foreclosure and sale; the provisions of section 274 of the Code not being applicable to such cases. *Cobb v. Thornton*, 8 How. 66.

Judgment of foreclosure and sale.

At a special term of the court of the State of New York,
held at , in the county of , on the day of ,
187 .

PRESENT—Hon. , Justice.

COURT.

A. B., plaintiff,
agst.

C. D. and E. F., defendants.

} *Judgment.*

The summons in this action having been served on the defendants,

Now on reading and filing the affidavit of , attorney for the *plaintiff* , proving that (*see Rule 72, Supreme Court*), and that the complaint in this action and due notice of the pendency of said action were duly filed in the office of the clerk of the county of , on the day of , one thousand eight hundred and seventy , and an order of reference having been made to compute the amount due to the *plaintiff* upon the bond and mortgage set forth in the complaint; (*recite order of reference briefly*), on reading and filing the report of the referee named in the order of reference, by which report, bearing date the day of , 187 , it appears that there was due thereon at the date of said report the sum of \$, and that (*insert findings of referee as to proof of facts and circumstances stated in complaint, etc., if the complaint was not answered or denied, and some of the defendants are absentees*).

Now, on motion of , attorney for the *plaintiff* , it is adjudged that the mortgaged premises described in the complaint in this action, as hereinafter set forth, or so much thereof as may be sufficient to raise the amount due to the *plaintiff* for principal, interest and costs, and which may be sold separately without material injury to the parties interested, be sold at public auction in the , county of , by or under the

In partition.

direction of ; that the said give public notice of the time and place of such sale, according to law and the practice of this court; that either or any of the parties to this action may purchase at such sale; that the said execute to the purchaser or purchasers, a deed or deeds of the premises sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, and any lien or liens upon said premises so sold, at the time of such sale, for taxes or assessments, the said pay to the *plaintiff* or *attorney*, the sum of dollars and cents, adjudged to the *plaintiff* for costs and charges in this action, with interest from the date hereof, and also the amount so reported due as aforesaid, together with the legal interest thereon, from the date of the said report, or so much thereof as the purchase-money of the mortgaged premises will pay of the same, take a receipt therefor, and file it with his report of sale; that he pay over the surplus moneys, arising from the said sale, if any there should be, to the treasurer of the county of , within five days after the same be received and ascertainable, subject to the further order of the court; that he make a report of such sale and file it with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount so reported due the *plaintiff*, with the interest and costs as aforesaid, the said specify the amount of such deficiency in his report of sale, and that the *defendant* pay the same to the *plaintiff*, and that the *plaintiff* have execution therefor, and that the purchaser or purchasers at such sale be let into possession on production of the deed, and a certified copy of the order confirming the report of sale.

And it is further adjudged that the *defendant* and all persons claiming under them, or any or either of them, after the filing of such notice of pendency of this action, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, or any part thereof.

The following is a description of the mortgaged premises hereinbefore mentioned :

Section 2. In partition. The judgment in partition must set forth the estate of each known owner, or of the defendants or some of them, collectively, when their rights between each other are disputed. *Phelps v. Green*, 3 Johns. Ch. 302. But there can be no objection to a statement that certain definite portions belong, collectively, to owners who are unknown. They may be described in general terms, as the descendants of a person deceased. *Hyatt v. Pugsley*, 23 Barb. 285.

The judgments, besides declaring the rights of the parties, and

Form of final judgment for divorce on the ground of adultery.

directing that partition should be made, may also provide for an account between the parties in respect to the rents and profits received. *Brownson v. Gifford*, 8 How. 389. But if the complaint does not demand such an account as against the defendants in possession, and they do not answer, it cannot be decreed. *Bullwinker v. Ryker*, 12 Abb. 311.

An omission of the referee to annex to his report the searches for incumbrances does not render a judgment on such report irregular. *Noble v. Cromwell*, 27 How. 289; affirming S. C., 6 Abb. 59; 26 Barb. 475. See Partition, *post*.

Section 3. For divorce.

Form of final judgment for divorce on the ground of adultery.

(Title of cause.)

This action having been tried on all the issues before E. B., sole referee, duly appointed (*or by a jury, or by the court—a trial by jury having been waived*), on reading and filing the pleadings and report of the referee (*or the verdict of the jury, or the decision, etc., as the case may be*), by which it appears that the said defendant has been guilty of the acts of adultery charged against him in the complaint in this action, and on motion of D. M., of counsel for the plaintiff, it is ordered and adjudged that the marriage between the said H. S. and the defendant M. S. be and the same is hereby dissolved; and the said parties are, and each of them is, freed from the obligations thereof. And it is further adjudged that it shall be lawful for the said plaintiff H. S. to marry again, in the same manner as though the said defendant M. S. were actually dead; but it shall not be lawful for the said defendant M. S. to marry again until the said plaintiff H. S. is actually dead.

And it is further adjudged that the said defendant pay to the said plaintiff or her attorney the costs of this action, hereby adjudged at the sum of dollars.*

(If the action be by the husband against the wife, and the illegitimacy of any child of the marriage has been established:)

It is further adjudged that N. S., the infant child of said defendant, is not the issue of said marriage between said plaintiff and said defendant, but is illegitimate and not entitled, in case of plaintiff's death intestate, to inherit or share any portion of his estate, real or personal.

It is further adjudged that said defendant is not entitled to any right or title of dower in the plaintiff's real estate, or to any interest or distributive share in his personal property in case of his death intestate.

The like judgment in favor of wife, with provisions as to alimony, etc.

The like judgment in favor of wife, with provisions as to alimony and custody of children, etc.

*(Same as preceding form to the *, then add:)*

And it is further ordered that the defendant pay to the plaintiff the sum of five hundred dollars per annum from the date hereof, in quarterly payments, for the support and maintenance of the plaintiff and the children of the marriage named in the complaint, and that he give security to the clerk of this court, in , to be approved by one of the justices thereof, for the payment of the said sum; but such payment is (not) to be in lieu of her right of dower in his real estate or interest in his personal property in case of his death intestate, and that the plaintiff have the care, custody and education of the said children of the marriage, until the further order of this court.

As to the amount of counsel fees or alimony allowed, see *Forest v. Forest*, 3 Abb. 144; S. C., 6 Duer, 102; *Leslie v. Leslie*, 6 Abb. N. S. 193; S. C. affirmed, 10 id. 64; *Miller v. Miller*, 43 How. 125.

In an action for divorce on the ground of adultery, brought against the wife, if she sets up an affirmative defense, such as recrimination, alimony and counsel fees will be denied her in the discretion of the court, where it appears that she has no reasonable ground for defense. *Clark v. Clark*, 7 Rob. 284; *Strong v. Strong*, 5 id. 612; S. C., 1 Abb. N. S. 358. See *Ford v. Ford*, 41 How. 169. As to the allowance of alimony where marriage is denied, see *Brinkley v. Brinkley*, 50 N. Y. (5 Sick.) 184.

Recital in case of adultery, where the usual reference to take proof has been had.

(Title of cause.)

(Caption.)

This action having been brought on to be heard upon the pleadings herein (or, upon the complaint herein), and upon proof of defendant's failure to answer, and upon the report of B. D., duly appointed referee in this action, from which it appears that all the material facts alleged in the complaint are true, and that the defendant has been guilty of the several acts of adultery therein charged; now, on due proof of service of notice of hearing, on motion of D. M., attorney for the plaintiff, no one appearing to oppose, it is ordered and adjudged, etc.

Judgment for limited divorce.

(Recitals of proceedings and verdict, decision or report, as in other forms, ante, art. 2-4, continuing:)

Therefore, it is adjudged that the said plaintiff and defendant

Specific performance—Form of judgment against vendor.

be separated from bed and board forever; provided, however, that the parties may at any time hereafter, by their joint petition, apply to this court to have this judgment modified or discharged.

And it is further ordered and adjudged, that neither of said parties is at liberty to marry any other person during the life of the other party.

(Provision as to custody of children, alimony, etc., as in form preceding the last.)

Section 4. Specific performance. A judgment for special relief which requires the performance of some act by the party (as, for example, the acknowledgment of satisfaction of a mortgage) against whom such judgment is rendered, should contain the proper order directing the performance of the act; and disobedience to such order may be punished by the court as for a contempt, under section 285 of the Code. *Fero v. Van Ebra*, 9 How. 148.

Where the judgment requires a party to execute a conveyance, it should provide for the settlement of the form of the instrument before a judge or referee. If, however, an instrument in proper form is tendered to the party he is bound to execute it, although it has not been submitted to the court or judge for approval. *Hilliker v. Hathorne*, 5 Bosw. 710.

Judgment for a specific performance by a vendor should not direct the defendant to procure releases from parties over whom he has no control. See *Mills v. Van Voorhis*, 23 Barb. 125; *Brown v. Haff*, 5 Paige, 235. In such case the judgment should direct a reference to ascertain whether the defendant can give a good title, the amount of any incumbrance which is a lien on the premises and can be discharged by the payment of money, etc. It should also provide for the discharge, by such referee, of the incumbrances which could be so paid off, and the execution within a short time, by the defendant to the plaintiff, of a good and sufficient conveyance of the premises in fee simple. *Jerome v. Scudder*, 2 Rob. 169.

Form of judgment against vendor.

(Recitals of proceedings and verdict, decision or report, as in forms ante, art. 2-4, continuing:)

Therefore, it is ordered, adjudged and determined: I. That the agreement set forth in the complaint, and duly proven in this action, be specifically performed; and that the* defendant execute and deliver to the plaintiff (upon his demand in writing) a good and sufficient conveyance in fee, with full covenants, the

Form of judgment against purchaser.

form of the same to be settled and approved by one of the justices of this court (*or*, by the referee hereinafter named), in case the parties differ respecting it, of the following described premises (*here set forth description of premises*):

II. And it is further adjudged, that the plaintiff, upon the delivery or tender of said conveyance, do pay to the defendant or his attorney dollars, (the residue of) the purchase-money named in the contract set forth in the complaint, with interest from the day of (subject, however, to a deduction and abatement to which the plaintiff is hereby adjudged to be entitled, for the deficiency in the amount of the land agreed to be conveyed; and it is further ordered that it be referred to E. B., Esq., of , counselor at law, to compute and ascertain the amount of such abatement, and the amount of purchase-money remaining due after such deduction, and the interest thereon).

III. And it is further adjudged, that if the plaintiff upon a tender of said conveyance refuse to pay the sum so found due, † the premises hereinbefore described be sold by said referee (*or*, by the sheriff of the county of), by public auction (*proceed with directions for sale, and decree over for deficiency. See forms of judgment in foreclosure, ante, 626, § 1.*)

(*Or, instead of directing a sale, the following, beginning at the †, may be substituted for the above; the plaintiff be barred of his right to a specific performance of said contract; and that the contract be given up to be canceled.*)

IV. And it is further adjudged, that the plaintiff recover of the defendant dollars costs of this action, and may have execution therefor.

Where the complaint prays for a specific performance, or, in the event that cannot be compelled, for damages, the court will entertain the case and award damages if performance cannot be enforced. *Woodward v. Morris*, 2 Barb. 439; *Wiswall v. McGown*, id. 270; *Barlow v. Scott*, 24 N. Y. (10 Smith) 40; *Greason v. Keteltas*, 17 N. Y. (3 Smith) 491; *Marquat v. Marquat*, 12 N. Y. (2 Kern.) 336; reversing S. C., 7 How. 417. And where the demand for a complete performance cannot be acceded to, a partial performance may be decreed, if the plaintiff asks for such relief at the trial; but it cannot be granted on appeal. *Mills v. Van Voorhies*, 20 N. Y. (6 Smith) 412; S. C., 10 Abb. 152; reversing S. C., 23 Barb. 125.

Form of judgment against purchaser.

(*Same as preceding form to the *, substituting "plaintiff" for "defendant," and "defendant" for "plaintiff," and continuing:*)

 Against infants — Surrender of documents.

II. And it is further adjudged, that if the defendant refuse to receive said deed, the plaintiff file the same with the clerk of this court; and that, upon such delivery or filing of said conveyance, the defendant pay to the plaintiff or his attorney dollars (the residue of) the purchase-money named in the contract, set forth in the complaint, with interest from the day of , 18 .

Section 5. Against infants. No judgment for special relief should be made against an infant without giving him a day, after he comes of age, to show cause against it (*Bushnell v. Harford*, 4 Johns. Ch. 301; *Mills v. Dennis*, 3 id. 367; *Wright v. Miller*, 1 Sandf. Ch. 103; S. C., 4 Barb. 611; 8 N. Y. [4 Seld.] 18); the time being usually fixed at six months after coming of age. *Ib.*; *Harris v. Youman*, Hoffm. 178. Without such a clause, the judgment may be shown to be erroneous, and the infant may be relieved from it (*Wright v. Miller*, 1 Sandf. Ch. 103; S. C., 4 Barb. 611; 8 N. Y. [4 Seld.] 18); even though the judgment be not fraudulently obtained. *Ib.*; *Bushnell v. Harford*, 4 Johns. Ch. 301. But proceedings which are by the court decided to be for the benefit of the infant do not come within the application of this rule, although in the main the action be adverse to the infant. *Mills v. Dennis*, 3 Johns. Ch. 367. The rules as above stated were well settled under the former practice in chancery, but were not adopted by courts of law; and it may, therefore, be well doubted whether, under our present practice, they have any application in actions other than for special relief.

Section 6. Surrender of documents. Before a decree is made canceling an instrument of any kind, the court should clearly see that no person but parties to the suit can sustain a claim upon it; for, otherwise the decree should be for a perpetual injunction against those parties. *McEvers v. Lawrence*, Hoffm. Ch. 172; S. C. affirmed, 2 Ch. Sent. 25.

Form of judgment for surrender of a document.

(*Recitals as in form, ante, art. 2 to 4.*)

It is now, on motion of (etc.), adjudged, 1. That the contract set forth in the complaint was made under a mistake of material facts on the part of the plaintiff, and is, therefore, voidable by him. 2. That the defendant surrender the same to be canceled. 3. That the plaintiff recover of the defendant dollars, costs of the action.

Settlement of judgment — Judgment on appeal.

Section 7. Settlement of judgment. Where the defendant has appeared in the action, so as to be entitled to notice of the proceedings, the plaintiff cannot settle *ex parte* the form of the judgment to be entered, when it grants him special relief. In such case the defendant is entitled to notice of the application for settlement. *Wood v. Lambert*, 3 Sandf. 724; S. C., 1 Code R. N. S. 214. The length of notice required has not been determined by any fixed rule, two days being usually regarded as sufficient.

A draft of the judgment ordered should be prepared by the successful party, and a copy thereof served by him upon his opponent, with a notice of the time and place of settlement.

A judgment for special relief, entered without being settled as above, or without consent, will be set aside on motion. See *Wood v. Lambert*, 3 Sandf. 724; S. C., 1 Code R. N. S. 214.

ARTICLE IX.

JUDGMENT ON APPEALS.

Section 1. Proceedings on judgment in appellate court. A judgment on appeal is entered in the same manner as a judgment on an original hearing; and the entry will be that the judgment be affirmed or reversed, or, if modified, that it be done conformably to the manner prescribed by the court, adding to the judgment the usual award of costs. The judgment of the court of appeals is to be remitted to the court below, there to be enforced according to law; hence, it must be brought *formally* to the notice of such inferior court, and be made one of its judgments; and until the judgment of the court of appeals is incorporated into the records of the court below, no proceedings can be instituted to enforce its directions. *Seacord v. Morgan*, 17 How. 394; S. C. affirmed, 4 Abb. N. S. 249; 35 How. 487; 34 id. 626(n). The filing of the *remittitur* with the clerk, and his adjustment of the costs thereon is not sufficient. *Ib.*

The court below has no power to render any other judgment than one simply adopting that of the court of appeals as its own, and to take such measures as may be necessary to carry the determination of the appellate court into effect. *Macgregor v. Buell*, 17 Abb. 31; S. C. affirmed on this point, 1 Keyes, 153; 83 How. 450.

Judgment of affirmance and reversal.

Where judgment is rendered on appeal, and the defeated party desires to appeal further, it is the duty of the party in whose favor such judgment is rendered to make the formal entry of it at his own expense. *Purdy v. Peters*, 15 Abb. 160; S. C., 23 How. 328.

Section 2. Judgment of affirmance. Where a judgment entered at special term is appealed to the general term, and is there affirmed, a new judgment should not be entered; the simple judgment of affirmance with the award of costs, if any, should be attached to the original judgment roll. *Eno v. Crooke*, 6 How. 462; *De Agreda v. Mantel*, 1 Abb. 190; *Halsey v. Flint*, 15 Abb. 367; *Beardsley Scythe Co. v. Foster*, 36 N. Y. (9 Tiff.) 561; S. C., 3 Trans. App. 215; 34 How. 97. But when the appeal has been taken from the judgment of an inferior court, the old practice of entering a new judgment upon an appeal seems to be still applicable. *Ib.*; *Buck v. City of Lockport*, 43 How. 283. And if the judgment on appeal is affirmed with costs, the respondent is entitled to have the interest on the judgment below from the time of its rendition to the time of entering judgment of affirmance, taxed by the clerk, and inserted with the costs of appeal. *Buck v. City of Lockport*, 43 How. 283.

Where the case does not come up upon appeal, but merely upon a new trial on opening a former judgment which has been allowed to stand as security, a judgment for the whole amount will be proper, without reference to the previous judgment. *Miller v. The Eagle Life and Health Ins. Co.*, 3 E. D. Smith, 184.

When the judgment of the appellate court is given for the appellant absolutely and finally, no new trial being ordered, it is imperative upon the court to order restitution of all that the appellant has lost. Code, § 320; *Estus v. Baldwin*, 9 How. 80. See *Hall v. Emmons*, 11 Abb. N. S. 435.

Although it is irregular to include in the judgment rendered upon an appeal the amount of the judgment of the court below, yet where judgment is entered in that form payment of the amount thereof would operate not only as a satisfaction of such judgment, but of the judgment below included therein. *Beers v. Hendrickson*, 45 N. Y. (6 Hand) 665.

Section 3. Judgment of reversal. Upon appeal a judgment may now be reversed by the appellate court as to one of the several defendants who appeals, leaving it to stand as against the others who do not appeal, in cases in which a *several* judgment

Judgment of affirmance and reversal.

is proper. *Geraud v. Stagg*, 10 How. 369; S. C., 4 E. D. Smith, 27. And in an action of tort a joint judgment against several may, on appeal, be reversed as to one or more of the defendants, and affirmed as to the others. *Van Slyck v. Snell*, 6 Lans. 299.

When a judgment for the plaintiff in the marine or justice's court is reversed in the court of common pleas of New York without an award of final judgment for the defendant upon the merits, such reversal is not conclusive as to the rights of the parties; and in such case the costs incurred by the defendant in the inferior court cannot be allowed him and embraced in the judgment of reversal. *Ellert v. Kelly*, 4 E. D. Smith, 12; S. C., 10 How. 392. See *Hunt v. Hoboken Land and Improvement Co.*, 1 Hilt. 161.

Section 4. Judgment of affirmance and reversal. Under the former practice the rule appears to have been well settled that an entire judgment against several defendants, whether rendered in an action for *tort* or upon contract, could not be reversed as to one defendant and allowed to stand as to the others. *Camp v. Bennett*, 16 Wend. 48; *Cruikshank v. Gardner*, 2 Hill, 333; *Sheldon v. Quinlen*, 5 id. 441, 442, note a; *Harman v. Brotherson*, 1 Denio, 537; *Schoonhoven v. Comstock*, id. 655; *Moulton v. Norton*, 5 Barb. 296; *Geraud v. Stagg*, 10 How. 369; S. C., 4 E. D. Smith, 27. The Code provides, however, that "in giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, and as to any or all the parties, and for errors of law or fact." Code, § 366. See Code, §§ 12, 274. Under this clear provision of the Code there can be no question in respect to the right and power of the court, on appeal, to reverse a judgment as to one defendant and affirm it as to the other, and especially in an action of tort where a cause of action had been made out against one and not against the other. See *Hubbell v. Meigs*, 50 N. Y. (5 Sick.) 480; *Bullis v. Montgomery*, id. 352. In such a case the plaintiff is entitled to a several judgment against the one, but not against the other. *Van Slyck v. Snell*, 6 Lans. 299.

And where there are several defendants and the judgment appealed from is in their favor, such judgment may be affirmed as to some of the defendants and reversed and a new trial ordered as to others, when it would have been proper to render separate judgments in the inferior court. *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. (3 Seld.) 459; S. C. below, 8 Barb. 396;

Dismissal of appeal — Judgment for costs.

Campbell v. Perkins, 6 N. Y. (2 Seld.) 86 (n); 8 N. Y. (4 Seld.) 430; *Geraud v. Stagg*, 10 How. 369; S. C., 4 E. D. Smith, 27. So where a judgment appealed from consists of distinct matters, and those matters are so presented that a *final* judgment may be rendered by the appellate court upon each, the judgment may be affirmed as to part and reversed as to the residue. *Tillou v. Kingston Mut. Ins. Co.*, 5 N. Y. (1 Seld.) 405; S. C. below, 7 Barb. 570; *Story v. New York & Harlem R. R. Co.*, 6 N. Y. (2 Seld.) 85, 89. Such, also, was the practice prior to the adoption of the Code. See *Smith v. Jansen*, 8 Johns. 111; *Bradshaw v. Callaghan*, id. 558; reversing S. C., 5 id. 80; *Parker v. Van Houten*, 7 Wend. 145; *Van Bokkelen v. Ingersoll*, 5 id. 315.

A judgment cannot, however, be affirmed as to part of the amount recovered and reversed as to the residue, where a new trial would be ordered as to the part so reversed. *Story v. New York & Harlem R. R. Co.*, 6 N. Y. (2 Seld.) 85. See *Sears v. Conover*, 33 How. 324; S. C., 3 Keyes, 113; affirming S. C., 34 Barb. 330.

Section 5. Dismissal of appeal. The judgment on appeal from the special to the general term, in case of a dismissal, is held to be proper in the following form: "It is ordered and adjudged that such appeal be dismissed and such judgment affirmed with costs, and that the respondent do recover and have execution for costs, etc., and inserted in the entry of this judgment." *De Agreda v. Mantel*, 1 Abb. 130.

ARTICLE X.

JUDGMENT FOR COSTS.

Section 1. When judgment for, can be awarded. It has been held that, where an action has been dismissed on the ground that the court have no jurisdiction, as for example, by reason of the non-residence of the plaintiff, that judgment for costs, on dismissing the complaint, cannot be rendered. *Harriot v. The New Jersey R. R. Co.*, 8 Abb. 284; S. C., 2 Hilt. 262. But the case in which this rule was laid down was reversed (see 1 Daly, 377), and the rule limited in its application to those cases only where the want of jurisdiction is apparent on the face of the summons or complaint. See *Gormly v. McIntosh*, 22 Barb. 271; *Humiston v. Ballard*, 40 How. 40; S. C., 63 Barb. 9.

Judgments upon frivolous pleadings.

Where the want of jurisdiction does not appear upon the face of the proceedings, but is presented by demurrer, the court has jurisdiction to pass upon and determine the question presented; and in such case the party prevailing is entitled to costs. *Ib.*; *King v. Poole*, 36 Barb. 242. In the following cases it is held that, where an action is dismissed by the court for want of jurisdiction, a judgment may be rendered for costs: *McMahon v. The Mut. Benefit Life Ins. Co.*, 8 Abb. 297; S. C., 3 Bosw. 644; *The Cumberland Coal & Iron Co. v. The Hoffman Steam Coal Co.*, 15 Abb. 78; S. C., 39 Barb. 16; S. C. before, 20 How. 62; 30 Barb. 159. See *Hunt v. Bank of Hanover*, 8 Metc. 343.

If there is any question as to the power of the court to render judgment for costs, where it has in fact been entered by the clerk, the proper practice to bring up the question is by an appeal from the judgment. Such an appeal does not, however, confer a new jurisdiction. *Harriot v. New Jersey R. R. Co.*, 8 Abb. 284; S. C., 2 Hilt. 262.

Where, on an insufficient recovery by the plaintiff, costs are awarded to the defendant, the costs should be set off against the plaintiff's recovery, and there should be but one judgment entered for the excess of the one over the other, to whichever party it belongs. *Johnson v. Farrell*, 10 Abb. 384.

Provision setting off costs of the defendant against the plaintiff's judgment.

(To the judgment of dismissal (see, ante, 620) add the following): And that said costs be and the same are hereby set off against so much of the plaintiff's judgment, mentioned in the complaint for dollars, entered in the office of the clerk of the county of , on the day of , 18 .

ARTICLE XI.

JUDGMENTS UPON FRIVOLOUS PLEADINGS.

Section 1. Form of judgment. Where judgment is ordered for the plaintiff on a frivolous answer or demurrer, he takes judgment in the same manner as if no answer or demurrer had been put in, where there is no other issue. *Aymar v. Chase*, 1 Code R. N. S. 141; *King v. Stafford*, 5 How. 30; *Saltus v. Kipp*, 2 Abb. 382; S. C., 5 Duer, 646; 12 How. 242. On the application for judgment, in such case, the defendant is entitled to notice. *Ib.* See Code, § 247.

CHAPTER IV.

JUDGMENT BY DEFAULT.

ARTICLE I.

WHO MAY TAKE.

Section 1. In general. The cases and manner in which judgment may be taken by the plaintiff, on default of the defendant to answer the complaint, are specified in section 246 of the Code, and will be fully treated of in subsequent parts of the present chapter. Judgment may also be entered by default in favor of the plaintiff, in certain other cases, which will be noticed under their appropriate heads. But judgment by default is not alone entered in favor of the plaintiff, there being many cases in which the defendant is entitled to such judgment as will be hereafter seen.

Section 2. Where pleadings have been stricken out. Where an answer has been stricken out as sham and irrelevant, the case stands as if no answer had been put in; and, if the defendant's time to answer has expired, the plaintiff can enter judgment as in the case of a default. *Potter v. Carreras*, 4 Rob. 629; *De Forrest v. Baker*, 1 Abb. N. S. 34; S. C., 1 Rob. 700. If the summons be for relief, the defendant is entitled to the usual notice of application for judgment, after the answer has been stricken out. *Ib.* If a demurrer has been served by the defendant, it is an answer within the provisions of section 246 of the Code, and judgment cannot be taken by the plaintiff as on failure to answer. *Brodhead v. Broadhead*, 3 Code R. 8; S. C., 4 How. 308. See *Kelly v. Downing*, 42 N. Y. (3 Hand) 71. But if there is a direction for judgment on a frivolous demurrer, answer or reply, under section 247 of the Code, or the demurrer has been overruled, in either case there is a failure to answer, and the same proceedings may be taken as where neither answer or demurrer has been put in. *Saltus v. Kipp*, 2 Abb. 382; S. C., 12 How. 342; 5 Duer, 646; *King v. Stafford*, 5 How. 30; *Aymar v. Chase*, 1 Code R. N. S. 141.

Section 3. Where party has been allowed to plead over on terms. Where a party has been allowed by the court to plead over, or

Default of plaintiff.

to amend upon terms, and, at the expiration of the time allowed, such terms have not been complied with, judgment by default may be entered by the party who has prevailed on the decision of the demurrer or motion for judgment. See *Walton v. Walton*, 32 Barb. 203; S. C., 11 Abb. 231; 20 How. 347.

ARTICLE II.

DEFAULT OF PLAINTIFF.

Section 1. On failure of plaintiff to serve complaint on demand. The court may dismiss the complaint, with costs, in favor of one or more defendants, where the plaintiff unreasonably neglects to proceed in the cause. Code, § 274. The time within which the plaintiff is required to serve a copy of the complaint is twenty days after demand (Code, § 130), and, if he neglects to do so, it is proper for the defendant to move for a dismissal of the complaint. If such motion is granted, the action is discontinued. *Littlefield v. Murin*, 4 How. 306; S. C., 2 Code R. 128; *Colvin v. Bragden*, 5 How. 124; S. C., 3 Code R. 188; *Baker v. Curtiss*, 7 How. 478; *Skinner v. Noyes*, 7 Rob. 228, 232. See part 7, ch. 1, art. 1; also, ch. 7, art. 2.

Section 2. On failure of plaintiff to serve summons on some defendants. The court may also dismiss the complaint with costs, in favor of one or more of the defendants, in case of an unreasonable neglect to serve the summons on other defendants, or to proceed in the action against the defendants served. Code, § 274. See, *ante*, vol. 2, 607, where this subject is fully treated.

Section 3. On failure of plaintiff to bring cause to trial. Under subdivision 4 of section 274 of the Code, which provides for the dismissal of an action in case of an unreasonable neglect to proceed in it, the motion to dismiss must be denied if the delay be shown to be *not* unreasonable; and it has been held that if the delay be shown even to be unreasonable the court is not absolutely required, under the subdivision named, to dismiss the complaint (*Perkins v. Butler*, 42 How. 102); but, on the other hand, may even refuse to entertain the application altogether, on the ground that there is no necessity for it, inasmuch as the defendant had it in his own power to bring the cause to trial as soon as it was reached according to the course and practice of

On failure to furnish security for costs.

the court. *Ib.* See *Carter v. Clark*, 2 Sweeny, 189, 192; see, also, vol. 2, ch. 7, art. 2.

Section 4. On failure to furnish security for costs. Judgment of dismissal of the complaint, with costs, may also be entered by the defendant on failure of the plaintiff to file security for costs, within the time prescribed by the order of the court; and this may be done notwithstanding the plaintiff's proceedings have been stayed. *Boyce v. Bates*, 8 How. 495; *Hinds v. Woodbury*, 29 id. 379; S. C., 19 Abb. 11; *Glover v. Cuming*, 12 Wend. 295; *Champlin v. Petrie*, 4 id. 209.

Section 5. On omission of plaintiff to bring in representatives of deceased defendant. So a judgment of dismissal of the complaint may be ordered, with costs in favor of a defendant, for an omission of the plaintiff to bring in the representatives of a deceased defendant, when necessary; but a reasonable time will be allowed by the court for bringing them in. *Chapman v. Foster*, 15 How. 241.

Section 6. On allowance of demurrer to complaint. Judgment by default may also be entered by the defendant, when a demurrer to the whole complaint has been allowed by the court, with leave to the plaintiff to amend, in case he fails to amend in pursuance of the permission.

Section 7. On allowance of demurrer to reply. And when the plaintiff has failed to reply to a counter-claim which exceeds the amount of his demand, or where a demurrer to such a reply has been allowed without leave to amend, and an application for judgment has been made and granted by the court, under section 154 of the Code; or where judgment has been granted upon such a reply as frivolous, without leave to amend—in all these cases the defendant is entitled to the entry of judgment by default. See Code, § 154.

ARTICLE III.

DEFAULT OF DEFENDANT TO ANSWER.

Section 1. On default of one of several defendants. If any one of a number of defendants, severally liable, fail to answer, judgment may be taken against him (Code, § 136); but this right to take judgment on default against one defendant, before the other has answered or made default, exists only where a several judg-

Partial default to answer.

ment is proper, and a judgment is not authorized against both defendants even to affect partnership property. In an action on contract, against defendants jointly liable, no judgment can regularly be entered until the time to answer of all the defendants served has expired. *Jacques v. Greenwood*, 1 Abb. 230. And where defendants are only jointly liable, judgment cannot be entered against one until the claim against all of them is decided. *Catlin v. Latson*, 4 Abb. 248; S. C., 13 How. 511; *Sluyter v. Smith*, 2 Bosw. 663. See *Ford v. David*, 1 Bosw. 569. Defendants who are jointly and severally liable may be treated as if severally liable. *Stannard v. Mattice*, 7 How. 4.

By an amendment to section 136 of the Code, it is provided that, "if the name of one or more partners shall, for any cause, have been omitted in any action in which judgment shall have passed against the defendants named in the summons, and such omission shall not have been pleaded in such action, the plaintiff, in case the judgment therein shall remain unsatisfied, may, by action, recover of such partner separately, upon proving his joint liability, notwithstanding he may not have been named in the original action; but the plaintiff shall have satisfaction of only one judgment rendered for the same cause of action." Code, § 136, subd. 4. See *Lane v. Salter*, 51 N. Y. (6 Sick.) 1.

Section 2. On default of all defendants. On failure of all the defendants to answer, judgment may be had by the plaintiff in the manner described by section 246 of the Code, and as will be fully explained in subsequent articles of the present chapter.

ARTICLE IV.

PARTIAL DEFAULT TO ANSWER.

Section 1. Where answer contains no denials, but sets up counter-claim. In actions on contract for the recovery of money only, if the defendant by his answer does not deny the plaintiff's claim, but sets up a counter-claim amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of his claim over the defendant's counter-claim. Code, § 246, subd. 1. See, *ante*, vol. 2, 519. And judgment entered in such case without serving a notice of assessment by the clerk is not irregular. *Robbins v. Watson*, 22 How. 293.

Statement admitting counter-claim — Defendant's non-appearance on trial.

Section 2. Statement admitting counter-claim. A statement admitting the defendant's counter-claim is required to be filed by the plaintiff with the clerk of the court, which statement must be annexed to and constitutes a part of the judgment roll. Code, § 246, subd. 1. For form of statement, see *ante*, Vol. 2, 520.

Section 3. Notice of taxation of costs. Notice of the taxation of costs should of course be given.

Judgment thereon.

(*Title of cause.*)

The plaintiff having filed with the clerk a statement admitting the counter-claim contained in the answer of the defendant, now, on motion of _____, counsel for the plaintiff:

It is ADJUDGED that the plaintiff recover of the defendant _____ dollars, being the excess of the plaintiff's claim over the said counter-claim, together with _____ dollars costs of this action, amounting in the whole to _____ dollars.

(*Date.*)

(*Signature of clerk.*)

ARTICLE V.

DEFENDANT'S NON-APPEARANCE ON TRIAL.

Section 1. Effect of default. Where the defendant fails to appear on the trial the plaintiff may waive a jury and take an inquest before the court in a cause at the circuit, out of its regular order on the calendar, and judgment may be regularly entered in his favor. *Haines v. Davis*, 6 How. 118; S. C., 1 Code R. N. S. 407. It seems, however, that this should be done before the jury are discharged for the circuit. *Ib.*

Section 2. Inquest. At the taking of the inquest as above, the defendant is entitled to appear and cross-examine the plaintiff's witnesses, etc., as fully stated in treating of the subject of Trial. See, *ante*, 57.

ARTICLE VI.

PLAINTIFF'S FAILURE TO REPLY.

Section 1. Effect of failure to reply. Where the answer contains a statement of new matter constituting a counter-claim, and the plaintiff fails to reply or demur thereto within the time prescribed by law, application for judgment may be made by the defendant. Code, § 154. So where the court orders a reply to

Notice of application for judgment—Affidavits and other papers.

be made to new matter in the answer not constituting a counter-claim, the same course may be adopted on failure of the plaintiff to reply. Code, § 153. See *ante*, Vol. 2, 520.

Section 2. Notice of application for judgment. The motion for judgment in such case must be made upon a notice of not less than ten days. Code, § 154. For form of notice see *ante*, Vol. 2, 521.

Section 3. Affidavits and other papers. The papers required on the motion, are the summons, complaint, answer, notice of motion, the usual affidavit of service of the answer made by the person who served it, and an affidavit by the attorney, or his principal clerk, that no reply has been received. If the answer contains no counter-claim, a certified copy of the order, requiring a reply, and an affidavit of service of such order, should also be presented to the court. See *Brown v. Spear*, 5 How. 146; S. C., 9 N. Y. Leg. Obs. 97; 3 Code R. 192. Judgment can be rendered only by the court when sitting as such. *Aymar v. Chace*, 12 Barb. 301; S. C., 1 Code R. N. S. 330. See *ante*, Vol. 2, 521.

Affidavit of no reply.

(Title of cause.)

(Venue.)

A. B., being duly sworn, says:

I. That he is the (managing clerk in the office of the) defendant's attorney in this action.

II. That the answer herein was served on the plaintiff's attorney on the day of , 187 , and that no copy of any reply or demurrer has been served on deponent (or on , the defendant's attorney herein.)

(*Jurat.*)

(*Signature.*)

Section 4. Writ of inquiry. If the case is of such a nature as requires it, a writ of inquiry may be issued to assess damages (Code, § 154), the proceedings upon which will be similar to those upon the writ or order granted upon failure to answer.

Section 5. When judgment may be entered. On the papers above described the motion for judgment may be heard, and if granted absolutely, the judgment may be at once entered.

Order for judgment for want of a reply.

(Title of cause.)

(At a special term, etc.)

On reading and filing the affidavit of A. B., by which it appears that the defendant's answer herein, setting up a counter-claim,

Judgment without application to court.

was duly served on the plaintiff, more than twenty days since, and that no reply or demurrer thereto has been interposed by the plaintiff,

It is ordered, that judgment be entered herein in favor of the above-named defendant against the above-named plaintiff for the sum of dollars (*or state other relief sought*) besides the costs and disbursements of this action, together with dollars, costs of this motion.

Form of judgment thereon.

(*Title of cause.*)

The defendant in this action, having duly served his answer on day of last, setting up a counter-claim to the plaintiff's cause of action, and the plaintiff having failed to reply or demur thereto, now, on motion of E. F., for defendant:

It is adjudged, that said defendant recover, etc., (*as in preceding form*).

ARTICLE VII.

JUDGMENT WITHOUT APPLICATION TO COURT.

Section 1. In what cases the clerk may enter judgment without order of court. The entry of judgment by default in certain cases, without application to the court, is authorized by subdivision 1 of section 246 of the Code, by the provisions of which judgment may be so entered in any action upon contract for the recovery of money only where the summons has been personally served, and the defendant has failed to answer. As to the class of actions to which these provisions are applicable, the rule has been stated to be, "that where the action is brought for the recovery of a *money demand*, or a *sum certain*, judgment may be perfected without application to the court; but in all other cases such application should be required." *Flynn v. The Hudson River R. R. Co.*, 6 How. 308; S. C., 10 N. Y. Leg. Obs. 158; *Tuttle v. Smith*, 6 Abb. 329; S. C., 14 How. 395. See *Mason v. Hand*, 1 Lans. 66.

Section 2. Proof of default. In order that the plaintiff may obtain judgment as above provided, he is required to file with the clerk proof of personal service of the summons, or of the summons and complaint, if served together, upon the defendant or defendants against whom judgment is demanded, and, also, proof of the fact that no answer has been received. Code, § 246, subd. 1. A demurrer is included in the term "answer" within

Proof of default.

the meaning of this section, and hence judgment cannot be taken by the plaintiff if a demurrer has been served. *Brodhead v. Broadhead*, 3 Code R. 8; S. C., 4 How. 308; *Kelly v. Downing*, 42 N. Y. (3 Hand) 71, 77.

Judgment cannot be entered on default, where the answer is regularly served within the proper time, however imperfect the statements contained in it may be (*Spencer v. Tooker*, 12 Abb. 353; S. C., 21 How. 333; *Bergman v. Howell*, 3 Abb. 329; *Strout v. Curran*, 7 How. 36); but if it be required that an answer should be verified by the oath of the party, and it is served without such verification, or if it be otherwise irregularly served, it may be returned, and the plaintiff may proceed for the want of an answer. *Ib.*; *Farrand v. Herbeson*, 3 Duer, 655; *Philips v. Prescott*, 9 How. 430. He does so, however, at his peril, in case his objection is not sustained, and if his own pleading be irregular, the pleadings of both may be allowed to stand. *Bank of State of Maine v. Buel*, 14 How. 311.

The affidavit that no answer has been received must show that no answer has been received within twenty days after the service of the summons. This rule is in accordance with the settled practice of the court, under which an answer served after the expiration of the time to answer, but before application for judgment, is ineffectual. See *McGown v. Leavenworth*, 2 E. D. Smith, 24, 31. See *Brien v. Casey*, 2 Abb. 416, in which it is held, that the affidavit must show that no answer has been received up to the time of noticing the application for judgment; and an affidavit made five years previous to such application was held insufficient. Care should be taken by the plaintiff, or his attorney, that judgment be not signed prematurely, and until the time to answer has fully expired. Where, on receipt of the summons, the defendant duly demands a copy of the complaint, the time runs from service of that copy. But if the summons is served alone, subsequent service of a copy of the complaint without demand, but in connection with other proceedings, will not change the time, which, in such case, will run from the service of the summons. *Van Pelt v. Boyer*, 7 How. 325. The plaintiff must wait the whole of the last day for the expiration of the time allowed, but will be regular in signing judgment the first thing on the succeeding morning. The entry of judgment, where there is an omission to file an affidavit that no answer has been received, is not a ground for an appeal to the court of

Affidavit of no answer — Assessment by clerk, when necessary.

highest resort, but is merely a question of practice, on which the decision of the general term is conclusive. *Catlin v. Billings*, 16 N. Y. (2 Smith) 622. The want of such an affidavit would, however, render the judgment irregular, and it would be set aside on motion, except in a case where the defendants are jointly liable, when it would be unnecessary. *Catlin v. Latson*, 4 Abb. 248; S. C., 13 How. 511.

Affidavit of no answer.

SUPREME COURT.

A. B., plaintiff, agent. C. D., defendant.	}	
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COUNTY OF _____, ss. :

E. F., being duly sworn, says that he is (the managing clerk in the office of D. M., the) plaintiff attorney in the above-entitled action, and that no answer or demurrer to the complaint in said action or copy thereof has been received by plaintiff attorney.

Subscribed and sworn to before me, }
 this day of , 187 . }

(*Signature of attorney or clerk.*)

Section 3. Assessment by clerk, when necessary. If the complaint be verified, the clerk enters judgment for the amount claimed without proof, no regular assessment being necessary. But where the complaint is not verified, the clerk must assess the amount due to the plaintiff, if the action is brought upon an instrument for the payment of money only, as a bill, note, bond, etc., by an examination of the instrument itself. In other cases, where the demand is not dependent upon a written instrument, as in an action for goods sold and delivered, work, labor, and services, money lent, etc., the clerk, before entering judgment, ascertains the amount which the plaintiff is entitled to recover, from his examination under oath, or other proof. Code, § 246, subd. 1. See *Hurd v. Leavenworth*, 1 Code R. N. S. 278; *Trapp v. The New York and Erie R. R. Co.*, 6 How. 237; S. C., 1 Code R. N. S. 384.

In the cases above provided for the amount of the plaintiff's recovery must be assessed by the clerk, and a reference ordered for the purpose will be irregular. *Croden v. Drew*, 3 Duer, 652; S. C., 6 Abb. 338 (n).

Where the assessment made is the amount due on an instru-

Assessment by clerk, when necessary.

ment produced to the clerk, a formal report has been held to be unnecessary. The Code does not require it, and as the clerk in such cases must enter the judgment for the amount he has assessed, the judgment roll is evidence that he did his duty in respect to assessing the amount due. *American Exchange Bank v. Smith*, 6 Abb. 1. But where the examination of the plaintiff or other proof has been taken, it is held that the clerk should make and file with the judgment roll a regular report of his finding, analogous to the former practice of making and filing reports upon assessment of damages. *Squire v. Elsworth*, 4 How. 77.

Section 4. Notice of assessment, when necessary. In all cases where the complaint is either not verified at all or is unduly verified, and the defendant has given notice of appearance in the action, either in direct form or by proceedings which amount to an appearance, he must have five days' notice of the time and place of the assessment, and if the judgment is entered without such notice it may be set aside as irregular. Code, § 246, subd. 1; *Van Horne v. Montgomery*, 5 How. 238; *Quin v. Tilton*, 2 Duer, 648; *Cook v. Pomeroy*, 10 How. 221; *King v. Stafford*, 5 id. 34.

It has been held that a notice of appearance served after the time for answering has expired entitles the defendant to notice of assessment, unless the assessment has already been made. *Abbott v. Smith*, 8 How. 463; *Carpenter v. New Haven R. R. Co.*, 11 id. 481. See *White v. Featherstonhaugh*, 7 How. 357, where the contrary is maintained; see, also, *Lynde v. West*, 12 Wend. 235; *Cook v. Pomeroy*, 10 How. 221; *Pearl v. Robitschek*, 2 Daly, 50.

In a case where the recovery of money only is sought, and the complaint has been duly verified, a defendant who has failed to answer, though he may have appeared, is not entitled to any notice of assessment whatever, and judgment may be entered as of course. *Southworth v. Curtis*, 6 How. 271; S. C., 1 Code R. N. S. 412; *Dick v. Palmer*, 5 How. 233; S. C., 3 Code R. 214. So where the plaintiff admits the defendant's counter-claim and takes judgment for the balance, it is not irregular to enter up judgment without serving a notice of assessment by the clerk. *Robbins v. Watson*, 22 How. 293.

As to what constitutes sufficient notice of the assessment, see *Kelsey v. Covert*, 15 How. 92; S. C., 6 Abb. 336 (n); *Anonymous*, 4 Sandf. 693; *Oothout v. Rooth*, 12 Johns. 151.

Proof of notice—Judgment on application to court.

Notice of assessment of amount of recovery.

(Title of cause.)

Take notice that the amount due to the plaintiff upon the instrument mentioned in the complaint will be assessed (or, if the action is not on a written instrument for the payment of money only, that the amount which the plaintiff is entitled to recover in this action will be ascertained), and his costs and disbursements, the items whereof are herewith stated, will be adjusted by the clerk of _____, at his office in _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon.

(Date.)

(Signature of plaintiff's attorney.)

(Address.)

Section 5. Proof of notice. The necessary proof of service of the notice of assessment, in cases where the defendant has appeared, and is entitled to it, should be prepared in due form to be available as ground for an *ex parte* entry of judgment, in the event of the defendant's non-appearance.

ARTICLE VIII.

JUDGMENT ON APPLICATION TO COURT.

Section 1. Application, when necessary. As before stated (*ante*, 561, ch. 1, art. 1, § 1), application for judgment, on failure of the defendant to answer, must be made to the court, in all actions other than those arising on contract for the recovery of a money demand or *sum certain*. In other words, where the summons has been issued under subdivision 2 of section 129 of the Code, it is necessary to make application to the court for the entry of the judgment sought. See Code, § 246, subd. 2; *Flynn v. The Hudson River R. R. Co.*, 6 How. 308; S. C., 10 N. Y. Leg. Obs. 158.

Where the action is brought for the recovery of a definite sum of money, as such, and without calling upon the court to ascertain or adjudge any thing but the existence and terms of the contract by which it is due, judgment may be entered on failure of the defendant to answer, without application to the court. But, where the action is such as to require the determination of amounts unliquidated in their nature, requiring other proof and depending upon other considerations than such as appear in the contract itself, then the action is not for the recovery of money

Application, where made — Notice of application.

only, and, on default of the plaintiff to answer, judgment can be entered only upon application to the court. *Tuttle v. Smith*, 14 How. 395; S. C., 6 Abb. 329. See 1 Wait's Pr. 474.

Section 2. Application, where made. The application for judgment may be made at any special term, in the district embracing the county in which the action is triable, or in an adjoining county (Sup. Ct. Rule 33), unless the trial county is New York. Code, § 401. The application may also be made at a circuit court in the county in which the action is triable. Sup. Ct. Rule 33.

The application cannot be entertained by a judge at chambers. *Aymar v. Chace*, 12 Barb. 301; S. C., 1 Code R. N. S. 330. Nor can it be heard at a general term. *Ryan v. McCannell*, 1 Code R. 93; S. C., 1 Sandf. 709. See *Warner v. Kenny*, 3 How. 323; S. C., 1 Code R. 96; *Anonymous*, id. 82. As the judges in New York city, however, hold a special term in chambers every day, the application may be made at chambers in that city. *Porter v. Lent*, 4 Duer, 671; S. C., 2 Abb. 115.

Section 3. Notice of application. Where the defendant has not appeared at all, the application for judgment is of course *ex parte*, and no notice whatever is necessary. But, if the defendant gives notice of appearance in the action, before the expiration of the time for answering, he is entitled to eight days' notice of the time and place of application. Code, § 246, subd. 2. And a judgment taken without notice in such case is irregular, and will be set aside. *Saltus v. Kipp*, 12 How. 342; S. C., 2 Abb. 382; 5 Duer, 646; *Kelsey v. Covert*, 15 How. 92; S. C., 6 Abb. 336, *note*; *King v. Stafford*, 5 How. 30. As to what is an appearance, see 1 Wait's Pr. 556-562.

Notice of application.

(*Title of cause.*)

Please take notice, that the plaintiff will apply to this court, at a special term to be held at (etc.), on the _____ day of _____, 18____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel may be heard, for the relief demanded in the complaint.

(*Date.*)

(*Signature.*)

(*Address.*)

Section 4. Affidavit of service and default. The service of the summons and default of the defendant must be proved in the same manner as on the entry of judgment by the clerk. See *ante*, 644.

Proof of plaintiff's demand — In actions for special relief.

In either case the proper proof of such service and default is a sheriff's certificate of service, the defendant's admission, or an affidavit of service by the person who made it and of the non-receipt of an answer by the person who subscribed the summons, or his managing clerk. See Code, § 138.

See Form of Affidavit, etc., 1 Wait's Pr. 541 to 544.

Section 5. Proof of plaintiff's demand.

a. In general. In actions embraced within the provisions of section 246 of the Code, subdivision 2, the plaintiff is allowed to make application to the court for judgment upon "the like proof" to that required upon application to the clerk. By the words "the like proof" is to be understood, the proof of serving the summons and complaint, and that no answer has been received. If the complaint is unverified the plaintiff is required to prove his claim; but if the complaint be verified, it is then in the discretion of the court to decide whether the plaintiff shall be called upon for evidence or not. See *Hurd v. Leavenworth*, 1 Code R. N. S. 278; *Depew v. Leal*, 2 Abb. 138 (n).

In all cases, the facts upon which a plaintiff relies for judgment against infant defendants must be established by legal proof (*Aldrich v. Lapham*, 6 How. 129; S. C., 1 Code R. N. S. 408; *Litchfield v. Burwell*, 5 How. 341; S. C., 1 Code R. N. S. 42; 9 N. Y. Leg. Obs. 182), even though the attorney for the guardian of the infant defendants may have consented in writing that such judgment be taken. *Ib.* See *James v. James*, 4 Paige, 115, 119; *Cost v. Rose*, 17 Ill. 275.

b. In actions for special relief. In actions for special relief, the same notice of the application for judgment is required to be given as in actions for damages. See *ante*, 649, § 3. So the service of the summons and failure to answer is to be proved in the same manner as on the entry of judgment by the clerk. *Ante*, 644.

If the taking of an account or the proof of any fact be necessary in any such action to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. Code, § 246, subd. 2. If damages, as well as other relief, are demanded, the court may assess them itself, or order them to be assessed by a jury, in like manner as in actions for damages alone, or it may order a reference, whether an account is involved or not. *Ib.*

Judgment demanded on a mere failure to answer is not ren-

In case of publication of summons.

dered as a matter of course in all actions for special relief; for sometimes proof of the plaintiff's case will be required by the court. *Lloyd v. Lloyd*, 4 Dru. & War. 372; *Hayes v. Brierly*, 3 id. 274; *Simmonds v. Pallas*, 8 Irish Eq. 335. See *Didier v. Warner*, 1 Code.R. 42. And in every case, unless the complaint shows some cause of action, it will be dismissed. *Speidall v. Jervis*, Dick. 632; *Molesworth v. Verney*, id. 687; *Simmonds v. Pallas*, 8 Irish Eq. 340. Not only must the complaint show a good cause of action, but the facts of the case must justify the particular kind of relief demanded, as none can be granted that is not specified in the complaint. Code, § 275.

As costs are wholly in the discretion of the court in actions for special relief (Code, § 306), the plaintiff should see that they are specially granted by the court, or he can enter none in the judgment.

c. In case of publication of summons. On application for judgment in actions where the service of the summons was by publication, the court will require proof to be made by the plaintiff of the demand mentioned in the complaint, and if the defendant be not a resident of the State, the plaintiff or his agent must be examined, on oath, respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and on such proof judgment may be rendered for the amount which the plaintiff is entitled to recover. Code, § 246, subd. 3.

In such cases the plaintiff is required to prove the service of the summons by producing a certified copy or original of the order for publication, the affidavits on which such order was founded, the affidavit of the printer of the newspaper in which the summons was published, or of his foreman or principal clerk, showing that it was published in conformity to the order. He must also produce an affidavit of the mailing of a copy of the summons and complaint to the defendant, or of the personal service of them upon him, and an affidavit or certificate of the filing of the complaint before the publication. See *Hallett v. Righters*, 13 How. 43; Code, § 138. See 1 Wait's Pr. 516, 531.

In actions for the recovery of money only, where the summons has been served by publication under section 135 of the Code, the plaintiff is also required to show by affidavit that an attachment has been issued in the action, and levied upon property belonging to the defendant. This affidavit must con-

Form of affidavit to proceedings. Summons served by publication.

tain a specific description of the property, with a statement of its value. Sup. Ct. Rule 34.

Form of affidavit to proceedings. Summons served by publication.

(Title of cause.)

E. B., plaintiff's attorney in this action, being duly sworn, says:

I. That on the day of , 18 , an order was duly made herein for service of the summons upon the defendant A. B. by publication, a copy of which order is hereto annexed.

II. That the summons and complaint were, on the day of , 18 , duly filed in the office of the clerk of , by this deponent (*or, as appears by the affidavit of D. M., or, the certificate of said clerk hereto annexed*).

III. That the summons was duly served by publication, and by mailing the same with a copy of the complaint (*or, by personal service of the same with a copy of the complaint, as appears by the affidavits of D. M. and R. T. annexed*; but that no answer or demurrer herein by said defendant has been served on the plaintiff's attorney, and said defendant has not appeared in the action.

IV. Deponent further says, that on the day of , 18 , an attachment against the property of said was duly issued in this action, and delivered to the sheriff of , by whom the same was, on the day of , 18 , at , levied on property belonging to the said defendant, whereof the following is a description: (*describe the articles*), and that the value of said property is dollars.

V. Deponent further says, that said defendant is (*or, is not, as the case may be*) a resident of this State.

(Jurat.)

(Signature.)

Before rendering judgment the court may, in its discretion, require the plaintiff to cause to be filed satisfactory security to abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply and be admitted to defend the action, and shall succeed in such defense. Code, § 246, subd. 3.

The filing of such security before judgment, in every action for the recovery of *money only*, is imperatively required by rule 34 of the supreme court, and the omission to do so would render the judgment irregular, though not void. See Sup. Ct. Rule 34.

Undertaking for restitution.

*Undertaking for restitution. Summons served by publication.**(Title of cause.)*

WHEREAS, in this action in which service of the summons was made upon the defendant C. D. by publication, the plaintiff is about to apply to the court for judgment upon the failure of the defendant to appear and answer:

Now, therefore, we, E. T., of No. street, in the city of , merchant, and K. L. (*state his residence and occupation*), do hereby, pursuant to the statute in such case made and provided, undertake that A. B., the plaintiff above named, will obey the order of the court concerning the restitution of any part of the estate or effects which said judgment may direct to be transferred or delivered, or the restitution of any moneys that may be collected under or by virtue of such judgment, in the event of the defendant or any of his representatives applying and being admitted to defend said action, and succeeding in such defense.

*(Date.)**(Signature.)*

(Annex affidavit of sufficiency; also acknowledgment and approval of judge.) See Forms, *ante*, Vol. 2, 152.

The Code makes no provision for a reference, for the purpose of ascertaining the truth of the complaint, where the summons was served by publication (see *Chapman v. Lemon*, 11 How. 235, 239); but the court may, undoubtedly, direct a reference for the examination of the plaintiff concerning payments on account, as this is taking an account before judgment, and within the provisions of section 271 of the Code.

*Reference to take proof of cause of action and payments. Summons served by publication.**(Title of cause.)**(At a special term, etc.)*

Upon the summons and complaint herein, and upon the affidavit of A. B., dated the day of , setting forth the proceedings had in this action (and on motion of A. B., for the plaintiff):

ORDERED: That it be referred to C. D., Esq., of , counselor at law, to take proof of the demand alleged in the complaint of the plaintiff herein (*or state particular inquiry*), and to examine the plaintiff, or his agent, on oath, respecting any payments that have been made to said plaintiff, or to any one, for his use; and to report to the court with all convenient speed.

On account of the delay and expense attendant upon a reference, it should not be ordered except in unavoidable cases.

Order for judgment—Assessment of damages.

*Order for judgment. Summons served by publication.**(Title of cause.)**(At a special term, etc.)*

The summons and complaint in this action having been filed in the office of the clerk of (this court in) the county of , on the day of , 18 , and the defendant M. N. being a foreign corporation, having property within this State *(or state other ground for service by publication, as the case may have been)*, service of the summons upon such defendant, by publication, having been ordered, and the summons having been duly published in the , and the , once in each week for six successive weeks *(or otherwise, as the case may be)*, as directed in the order for publication, commencing on the day of , 18 ; and a copy of the summons and complaint having been duly mailed to *(or, having been thereafter personally served on)* said defendant M. N. (addressed to their president X. Y., at); and the said defendant having failed to answer or demur to said complaint, or to appear herein, and an attachment having been issued against and levied upon property belonging to the said defendant M. N., and proof thereof made by the affidavit of X. Y.; and the plaintiff having now, in court, made proof of the demand mentioned in the complaint, and it appearing by the examination of (X. Y., the agent of) the plaintiff on oath that no payments that have been made to the plaintiff, or to any one to his use, on account of such demand *(or if any were made, state the amount)*; and the plaintiff having produced an undertaking, with two sureties, approved by the court, that he will make restitution according to the requirement of subdivision 3 of section 246 of the Code;

Now, on filing said affidavit of X. Y. and said undertaking, and on motion of X. Y., plaintiff's attorney, it is ordered that the plaintiff, D. E., recover against the defendant, M. N., the sum of dollars, together with his costs, to be adjusted by the clerk.

*(Signature of justice.)**Judgment thereon.*

On motion of X. Y. it is hereupon adjudged that the plaintiff, D. E., recover against M. N., the defendant, the sum of dollars, together with dollars costs and disbursements, amounting in the whole to dollars.

*(Date.)**(Signature of clerk.)***Section 5. Assessment of damages.**

a. How made. Where the action is for the recovery of money only, or of specific real or personal property, with damages for its detention, the court may order the damages to be assessed by a jury, or, if the examination of a long account is involved, by

Where made—Assessment by sheriff's jury.

a reference. Code, § 246, subd. 2. And a judgment by default cannot be taken in an action of this kind without an assessment (*Dutch Reformed Church v. Wood*, 8 Barb. 421), nor can a reference be ordered unless the case is one involving the examination of a long account. *Boyce v. Comstock*, 1 Code R. N. S. 290; *Hewitt v. Howell*, 8 How. 346; *Horn v. Doody*, 4 Duer, 670; S. C., 2 Abb. 92. The court may, however, itself assess the damages, without the aid of a jury or referee; and the advantages of such a course consist in the saving of referees' and jurors' fees, and what is of more importance, of the time required by a reference or writ of inquiry. *Depew v. Leal*, 2 Abb. 138 (n); *Gale v. Rubbins*, id.

It has been held that in an action for the recovery of specific property the plaintiff may waive his claim for damages for the detention, and may take judgment without any assessment (*Horn v. Doody*, 4 Duer, 670; S. C., 2 Abb. 92); but this can be allowed in an action for chattels, only where the plaintiff has obtained possession of the goods, for otherwise the judgment must be in the alternative for their return, or their value if they cannot be had (Code, § 277); and the value must therefore be assessed, as it cannot properly be put in issue, not being a traversable matter. *Connoss v. Meir*, 2 E. D. Smith, 314; *McKensie v. Farrell*, 4 Bosw. 192.

Under the former practice a writ of inquiry was never ordered in an equity suit, and a sheriff's jury would have no jurisdiction to assess damages. So under the Code an order allowing a writ of inquiry to have the damages assessed by a sheriff's jury in an equity case is altogether null and void, even though such order be entered on the consent of the defendant's attorney. In such case a reference is the proper course. *Kreitz v. Frost*, 55 Barb. 474; *Hill v. McReynolds*, 30 id. 488.

b. Where made. The assessment is required to be made in the county in which the action is triable, unless the court shall otherwise order (Sup. Ct. Rule 33); and if made in any other county the assessment will be irregular and the proceedings had thereon void, and will be set aside on motion. *Brush v. Mullany*, 12 Abb. 344.

Section 6. Assessment by sheriff's jury.

a. When proper. It is the regular course to direct the assessment to be made by a sheriff's jury (see *Horn v. Doody*, 4 Duer, 670; S. C., 2 Abb. 92; *Richards v. Swetzer*, 3 How. 413; S. C., 1

Order for writ of inquiry.

Code R. 117; *Stanley v. Anderson*, id. 52; *Cazneau v. Bryant*, 4 Abb. 402; S. C., 6 Duer, 668), but the court, in its discretion, may order an assessment at the circuit or trial term, and this is sometimes done in a case involving complicated questions of law, or where any incapacity exists on the part of the sheriff to act, or where there is any difficulty in regard to mitigating circumstances. *Ib.*; *Dillaye v. Hart*, 8 Abb. 394; *McCollum v. Barker*, 3 Johns. 153; *George, Count Joannes, v. Fisk*, 3 Rob. 710. So when public feeling has become strongly enlisted in the case to such an extent that it becomes necessary, for the protection of the rights of the parties, that they should be allowed to challenge jurors, the court will permit the assessment to be made at the circuit. *Dillaye v. Hart*, 8 Abb. 394.

The fact that the attorneys for the defendant are also the regular attorneys and counsel of the sheriff, is not a sufficient reason for ordering an assessment before the court and a jury. *Hays v. Berryman*, 6 Bosw. 679. And where, in an action for libel, the plaintiff has procured an order to have the damages assessed by a sheriff's jury, he cannot have the order vacated, and have the damages assessed before the court, unless something new has been discovered, rendering it proper that the change should be made. *George, Count Joannes, v. Fisk*, 3 Rob. 710; *Cozneau v. Bryant*, 4 Abb. 402; S. C., 6 Duer, 668.

Where the sheriff of the trial county is disqualified to act from interest, or other cause, the assessment should be made by a coroner.

b. Order for writ of inquiry.

Form of.

(Title of cause.)

(Caption.)

On reading and filing (the affidavits of A. B. and C. D.) and the summons and complaint herein, and it appearing by the complaint that the action is for the recovery of money only (*or*, is for the recovery of specific real property, *or* personal property), with damages for its detention; now, on motion of E. F., of counsel for the plaintiff, it is adjudged that the plaintiff do recover of the defendant the damages by him sustained on account of the cause of action alleged in the complaint (and that he do recover also the possession, etc.); and, further, it is ordered that said damages be assessed by a jury, and that a writ of inquiry be for that purpose issued, directed and delivered to the sheriff of _____ county.

Writ of inquiry — Order for sheriff's jury.

The order for the writ of inquiry must be filed with the clerk, who, thereupon, must seal a writ of inquiry, which may be in the following form :

[Seal.] *Writ of inquiry.*

The people of the State of New York, to the sheriff of the county of greeting :

WHEREAS, in an action brought by John Smith against John Jones in our supreme court, such proceedings were had upon the personal service of the summons therein upon said Jones, that the said John Smith obtained an order of the said court, directing the plaintiff's damages in the said action to be assessed by a jury, a copy of the complaint in said action being hereunto annexed ;

THEREFORE WE COMMAND YOU that, by the oaths of twelve good and lawful men of your county, you diligently inquire what damages the said John Smith has sustained by reason of the matters alleged in the said complaint ; and that you return your inquisition hereupon, under your seal, and the seals of those by whose oath you take such inquisition, together with this writ, to the clerk of the county of , on or before the day of , 18 .

Witness, Hon. J. P., justice, at the court-house, in the city of , in the county of , this day of , 18 .
(Signature of clerk.)

(Signature of plaintiff's attorney.)

The writ of inquiry must be served upon the sheriff immediately.

c. Order for sheriff's jury. By some judges an order for a sheriff's jury to assess damages is made, without the formality of a writ of inquiry. And this practice would seem to be justified by the language of the Code, section 246, which directs that the court may order an assessment by jury, and is wholly silent in reference to ordering a writ of inquiry.

Where no writ of inquiry is ordered, the following is the appropriate form :

Order for sheriff's jury.

(Title of cause.)

(Caption.)

On reading and filing (the affidavits of A. B. and C. D.), and the summons and complaint herein, on motion of (etc.):

ORDERED: That the plaintiff recover judgment, and that the sheriff of the county of assess by the oaths of twelve good and lawful men the plaintiff's damages in the premises, and

Order for assessment at circuit — Notice of inquiry.

return his proceedings hereupon under his and their seals to the clerk of the said county, within days after service of this order.

A certified copy of this order is required to be served on the defendant, in case he has appeared in the action.

d. Order for assessment at circuit. The order to assess damages at the circuit may also provide for the issuing of a writ of inquiry, but such a proceeding seems to be wholly unnecessary. In the execution of the order the judge acts in his own judicial capacity, and is not merely the assistant of the sheriff. *Ellsworth v. Thompson*, 13 Wend. 658.

Form of order to assess damages at the circuit.

(*Title of cause.*)

(*Caption.*)

On reading and filing (the affidavits of A. B. and C. D.), and the summons and complaint herein, on motion of (etc.):

ORDERED: 1. That the plaintiff recover judgment.

2. That his damages in the premises be assessed by the oaths of twelve good and lawful men, under the direction of the judge holding the circuit court (or trial term) at , commencing on the day of , 18 .

3. That the said judge return the inquisition hereupon to the clerk of the county of , duly certified by him, within days from the date hereof.

If the defendant has appeared in the action, a copy of the above order should be served upon him; and a certified copy should also be served upon the judge holding the circuit or trial term, at the commencement of the same.

e. Notice of inquiry. Where the defendant has appeared in the action, he is entitled to notice of the time and place of the assessment; which will be fixed by the sheriff on application to him. See Code, § 414; *Kelsey v. Covert*, 6 Abb. 336 (n.); *Saltus v. Kip*, 2 Abb. 382; S. C., 5 Duer, 646; S. C., 12 How. 342. But, to be entitled to such notice he must have appeared in the action 'before the expiration of the time for answering.' *Pearl v. Robitschek*, 2 Daly, 50. See *Abbott v. Smith*, 8 How. 463. It seems that a defendant not served with process, but jointly charged with another, will be entitled to notice of assessment if he anticipates the service by appearing in the action. *Pearl v. Robitschek*, 2 Daly, 50. The same notice is required as in cases of trial, namely, fourteen days. Code, § 256.

Under the old practice, the form of the notice was peculiar, the

Form of notice of inquiry before the sheriff.

time being required to be stated between two certain hours, as between the hours of 10 and 12 o'clock in the forenoon." *Arnold v. Squire*, Sayer, 181. A notice which, however, specified a precise hour, as "at 11 o'clock," was held to be good. *Last v. Denny*, Barnes, 302. A notice that the writ would be executed "by 10 o'clock," was held bad for uncertainty. *Ison v. Fowen*, 2 Str. 1142. So a notice that the writ would be executed "between 10 and 2 o'clock" (*Foster v. Smales*, Barnes, 295), or "at 10 o'clock, or as soon thereafter as the sheriff can attend," was also held bad for uncertainty. *Hannaford v. Holman*, Barnes, 295.

These rules are not applicable where the damages are to be assessed at the circuit or trial term, and the notice may be in the common form of a notice of trial, the judge appointing a day and hour for the execution of the writ. See 1 Tidd's Pr. 579; 1 Sellon, 353. In such case the notice must be served fourteen days before the commencement of the term; the service being made on the defendant's attorney in the usual manner.

The notice will not be vitiated by a mistake in it, unless the defendant is actually misled thereby. Thus a notice for "Wednesday, the 11th of June," when Wednesday fell on the 10th, was held to be good, the writ having been executed on the Wednesday (*Eldon v. Haig*, 1 Chit. 11); and so a notice given for "Tuesday, the 14th," although the 14th fell on Thursday, was held good, the writ being executed on the latter day (*Batten v. Harrison*, 3 Bos. & Pul. 1), and the defendant failing in either case to swear that he was misled by the error.

Form of notice of inquiry before the sheriff.

(Title of cause.)

Take notice that the damages which the plaintiff in this action is entitled to recover will be assessed before _____, Esq., sheriff of the county of _____, at _____, in _____, on the _____ day of _____, 18____, between the hours of _____ and _____ o'clock in the _____ noon. (Signature of plaintiff's attorney.)

(Date.)

(Address to defendant's attorney.)

Notice of inquiry at the circuit.

(Title of cause.)

Take notice that the damages which the plaintiff in this action is entitled to recover will be assessed at a circuit court (or, at a trial term of this court), to be held at (etc.), on (etc.).

(Date and address.)

(Signature.)

 Procuring evidence—Proceedings before jury.

Under the practice previous to the Code the notice might be countermanded if necessary, by the service of a notice of countermand at least six days before the day appointed for the execution of the writ (Grah. Pr. 797; 1 Burr. Pr. 376); and the same rule is probably valid under the Code.

Countermand of notice of inquiry.

(Title of cause.)

SIR: The notice of inquiry heretofore served upon you is hereby countermanded.

(Signature.)

(Date and address.)

After the notice of inquiry has been countermanded, notice must of course be given again *de novo*.

f. Procuring evidence. Evidence on the assessment is procured in the same manner as in case of a trial. Witnesses may be subpcnaed, or their testimony be otherwise obtained if necessary. Thus it is proper to issue a commission to take testimony on an assessment of damages. See Laws of 1862, ch. 375, p. 628.

The form of the subpoena to be used is the same as that in use upon ordinary trials, with the exception that it requires the witness to appear "before the sheriff or under-sheriff of the county of . . ." See *Tillotson v. Cheetham*, 2 Johns. 63, 70.

g. Proceedings before jury. The same proceedings may be taken on the assessment before the sheriff under the Code as were formerly proper on executing a writ of inquiry. *Saltus v. Kip*, 12 How. 342; S. C., 2 Abb. 382; 5 Duer, 646. The former practice in this respect is substantially continued by the Code, only that, in cases where the taking of an account or the proof of any fact is necessary to enable the court to give judgment, the court may in its discretion order a reference for that purpose. *Kreitz v. Frost*, 55 Barb. 474. The sheriff, under-sheriff or deputy may conduct the inquest (*Tillotson v. Cheetham*, 2 Johns. 63, 72), and the manner of proceeding is substantially the same as that on a trial in court, though less formality is observed. See 1 Burr. Pr. 377.

The inquest must be held at the time and place specified in the notice, even if the defendant fails to attend; and if not so held it will be set aside, on motion. *Jones v. Chune*, 1 Bos. & Pul. 364. The sheriff is not, however, bound to execute it within the precise hours mentioned in the notice, and, if neces-

Proceedings before jury.

sary, the defendant must wait after those hours have expired. *Williams v. Frith*, 1 Doug. 198.

The jurors cannot be challenged, in the full sense of the term, on a writ of inquiry of damages, for the reason that it is only an inquest of office, and the sheriff does not act in a judicial capacity. *Anonymous*, 3 Salk. 81; *Tillotson v. Cheetham*, 2 Johns. 63, 69; *Dillaye v. Hart*, 8 Abb. 394. But, see *George, Count Joannes, v. Fisk*, 3 Rob. 710. If, however, there is any legal or valid objection to a juror, it ought to be openly and publicly stated, and the sheriff may then set aside the juror against whom the objection is made, and summon another; or, if he should refuse to do so, it would be ground for an application to set aside the inquisition. *Butler v. Kelsey*, 15 Johns. 177. Thus the court will set aside the inquisition if notoriously unfit persons are put on the jury (*Stainton v. Beadle*, 4 Term R. 473); or if the sheriff, at the *private* request of one of the parties, removes a juror. *Butler v. Kelsey*, 15 Johns. 177. But the verdict of a jury, on the execution of a writ of inquiry, will not be set aside merely because the persons summoned as jurors were not on the list prepared by the commissioner of jurors, no objection having been made on executing the writ, and it not appearing that the persons were not fit and competent jurors. *Jennings v. Asten*, 3 Abb. 373; S. C., 5 Duer, 695.

The rules as regards evidence, on the inquest, are the same as upon an ordinary trial; but, as the cause of action is admitted by the default of the defendant, the plaintiff need not bring forward evidence for the purpose of establishing it, and any evidence on behalf of the defendant, tending to prove that no right of action existed, or denying the cause of action, is irrelevant and inadmissible. *Foster v. Smith*, 10 Wend. 377; *Green v. Hearne*, 3 Term R. 301; *East India Co. v. Glover*, 1 Str. 612; *Thellusson v. Fletcher*, 1 Doug. 315; *Livingston v. Douglas*, 2 Dowl. P. C. 630 (n); *Stephens v. Pell*, 2 Crompt. & Mees. 710. The only question to be taken into consideration by the jury is the amount of damages to which the plaintiff is entitled. *Foster v. Smith*, 10 Wend. 377; *De Gaillon v. L' Aigle*, 1 Bos. & Pul. 368. And, in an action for breach of contract, evidence that the contract was not made, or was void, is inadmissible (*East India Co. v. Glover*, 1 Str. 612; *De Gaillon v. L' Aigle*, 1 Bos. & Pul. 368), as is also evidence of a set-off that might have been pleaded. See *Caruthers v. Graham*, 14 East, 578. So, in an action for a

Inquisition and return.

wrong, evidence that the act was lawful is inadmissible, even though offered in mitigation of damages. *Foster v. Smith*, 10 Wend. 377. But any matter which properly goes to mitigate damages may be proved by the defendant, and for that purpose he may call witnesses. *Gilbert v. Rounds*, 14 How. 46; *Lane v. Gilbert*, 9 id. 150; *Warner v. Kenny*, 3 id. 323; S. C., 1 Code R. 96.

The complaint may properly be read to the jury as evidence of the facts alleged therein, but not as evidence of the amount of damages the plaintiff is entitled to recover, the latter not being admitted by the default of the defendant. *Jennings v. Asten*, 5 Duer, 695; S. C., 3 Abb. 373. The plaintiff is entitled to recover nominal damages, at all events, even though he produce no evidence on the inquest; and a verdict for the defendant will be set aside under all circumstances. *Jackson v. Rathbone*, 3 Cow. 296; *Marshall v. Griffin*, Ryan & Moo. N. P. 41; *Reigne v. Dewees*, 2 Bay, 405.

If the plaintiff, in an action for an assault and battery, claims more than nominal damages, he must prove the facts that will entitle him to recover them (*Bates v. Loomis*, 5 Wend. 134; *Gilbert v. Rounds*, 14 How. 46), but in an action for slander the rule is otherwise. *Tripp v. Thomas*, 3 Barn. & Cres. 427.

The inquest may be adjourned, when necessary, and this should be done when prolonged to a late hour on Saturday night, as the inquisition is not good if taken on Sunday. *Butler v. Kelsey*, 15 Johns. 177.

See "Trial," and "Inquest," *ante*, 53.

h. Inquisition and return. It is the duty of the jury to deliberate and agree upon their verdict, as soon as may be, after the submission of the case to them; and it is an irregularity for them to hear evidence in several causes before retiring to decide any. Such irregularity may, however, be waived by the assent of the parties. If not waived the error is not a ground for appeal, but only for a motion to set aside the inquisition. *Van Waggenen v. McDonald*, 3 Wend. 478. See *Colden v. Knickerbacker*, 2 Cow. 31.

It has been said that the inquisition should be signed and sealed in the name of the sheriff, and by the jurors. See 2 Chit. Arch. Pr. (12th ed.) 1003; 1 Burr. Pr. 377. But see *Scott v. Rushman*, 1 Cow. 212(n). See, also, 2 Til. & Shear. Pr. 267.

A blank form of inquisition should be left with the sheriff at

Form of inquisition — Setting aside inquest.

least one day before it is to be executed, indorsed with a memorandum of that day. 1 Burr. Pr. 377; 2 Til. & Shear. Pr. 264. After the blank form of inquisition has been filled up, the sheriff should indorse his return on the writ or order, in the following or some similar form :

“The execution of the within writ appears by the inquisition hereunto annexed.”

(Date.)

(Signature of sheriff.)

Form of inquisition.

STATE OF NEW YORK, }
County of } ss.:

An inquisition, taken on the day of , 18 , at the court-house, in the village of , in the county of , before me A. B., sheriff of said county, by virtue of a writ of inquiry (or, order to assess damages) to me directed, to inquire of certain matters by the oaths of (*here name the jurors*) twelve good and lawful men of the said county, who, being sworn, say that the plaintiff has sustained damages to the amount of dollars, by reason of the matters mentioned in the said writ (or order) (or that the value of the property mentioned in the said is dollars.)

In witness whereof, I, the said sheriff, and we, the said jurors, have set our hands and seals, the day and year above written.

(Signed and sealed by sheriff and jurors.)

i. Setting aside inquest. In a proper case either party may move to set aside the inquest, and the grounds upon which the motion to set aside will be entertained are similar to those of a motion to set aside a verdict, and for a new trial. 1 Burr. Pr. 379. And the proceedings upon the motion are so nearly analogous to those taken in the latter case that, for a full statement of them, it is only necessary to refer generally to that subject as treated under the head of trial. See *ante*, 394.

Motion to set aside the inquest is the only remedy allowed against errors which do not appear on the record, where judgment is thus taken. *Van Waggenen v. McDonald*, 3 Wend. 478. Thus, if the sheriff's jury hear more causes than one, before assessing the damages of any; or if the inquisition is made on a Sunday; or, if a juror is stricken off at the *private request* of a party, or if improper persons are retained upon the jury, after due objection made to them, the inquest will be set aside on motion. *Butler v. Kelsey*, 15 Johns. 177. So, if notoriously

Assessment at circuit.

unfit persons are placed on the jury (*Stainton v. Beadle*, 4 Term R. 473), or if the assessment is taken in the absence of the defendant, at a time or place other than that specified in the notice, it may be set aside. *Jones v. Chune*, 1 Bos. & Pul. 364.

The inquisition will also be set aside where improper evidence has been admitted on the part of the defendant; as where the defendant has been allowed to introduce evidence in denial of the cause of action (*De Gaillon v. L' Aigle*, 1 Bos. & Pul. 368); but if no injustice has been done by the introduction of such evidence, the court will not interfere. *Ward v. Haight*, 3 Johns. Cas. 80.

Nor will the court interfere to disturb the assessment of the jury on account of the smallness of the damages alone, unless there is clearly a mistake of fact (*Mechanics' Bank v. Minthorne*, 19 Johns. 244); or a mistake of the jury or sheriff in point of law (*Neale v. Wyllie*, 3 Barn. & Cres. 533; *Woodford v. Eades*, 1 Str. 425; *Markham v. Middleton*, 2 id. 1259; *Brookes v. Heberd*, 8 Dowl. & Ryl. 69); or unless there has been contrivance by the defendant (*Anonymous*, 2 Salk. 647); or surprise on the part of the plaintiff (*Hall v. Stone*, 1 Str. 515); or unless a witness to prove the demand decline giving evidence, and the sheriff, through ignorance of his authority, refuse to adjourn the execution of the writ. *Markham v. Middleton*, 2 Str. 1259. See 1 Tidd's Pr. 582; 1 Burr. Pr. 379. In any case a verdict for the defendant will be set aside. *Jackson v. Rathbone*, 3 Cow. 296.

Where it is sought to set aside the verdict upon alleged insufficiency of testimony to support it, the motion should be accompanied by affidavits, or a copy of the sheriff's notes, exhibiting the testimony given on the inquest. *Jennings v. Asten*, 5 Duer, 695. If the motion is made after the entry of judgment, the notice of motion should demand the setting aside of the judgment as well as the inquest; but if made before judgment is entered, the inquest only should be mentioned in the notice. 2 Til. & Shear. Pr. 269.

Section 7. Assessment at circuit. On the execution of the writ of inquiry at the circuit or trial term, the proceedings should be in all respects similar to those upon an ordinary inquest, so far as regards the impaneling of the jury and the assessment of the damages. *Ellsworth v. Thompson*, 13 Wend. 658, 662. As to the manner of conducting an inquest, see *ante*, 57.

Assessment by reference — Opening default.

The same rules respecting evidence are applicable to an inquisition taken before a judge as have already been mentioned as necessary to be observed on a corresponding proceeding before a sheriff. See *ante*, 660, § 6, *g*. The judge presiding at the inquisition should certify the result of it. *Ellsworth v. Thompson*, 13 Wend. 658, 664. See "Trial" and "Inquest," *ante*, 53.

Section 8. Assessment by reference. The proceedings upon a reference to assess damages are similar to those upon an ordinary trial by referees, as to which, see Trial by Referees, *ante*, 238, 253. The same rules of evidence are applicable as govern on an inquisition before a judge or sheriff. See last section.

The referee is required to make his report of the amount due to the plaintiff, and file it with the clerk, in the same manner and with like effect as the sheriff's inquisition and return. See 2 Til. & Shear. Pr. 267.

ARTICLE IX.

OPENING DEFAULT.

Section 1. Power of court to open. That the court has power to open a judgment obtained by default and allow a defense to be made in a case where a defendant has omitted to answer within the proper time, is undoubted. See *Allen v. Ackley*, 2 Code R. 21; S. C., 4 How. 5; *Clark v. Lyon*, 2 Hilt. 91; *Salutat v. Downes*, 1 Code R. 120; *Lynde v. Verity*, *id.* 97; *Foster v. Udell*, 2 *id.* 30; *Ramsey v. Gould*, 4 Lans. 476. And this may be done before judgment is entered (*Quinn v. Case*, 2 Hilt. 467; S. C., 9 Abb. 160); or even after the entry of the judgment. *Sharp v. Mayor, etc., of New York*, 31 Barb. 578; S. C., 19 How. 193; *Ellsworth v. Campbell*, 31 Barb. 134. See *Bogardus v. Livingston*, 7 Abb. 428; 2 Hilt. 236.

Section 2. When power will be exercised. Upon a motion to open a judgment entered against a defendant by default, the court merely looks into the defense desired to be interposed, so far as to be able to determine that it is not clearly frivolous; and if, in addition, the court is satisfied that the defense is set up in good faith, and the neglect of the party is satisfactorily excused, it is almost a matter of course to permit him to come in and answer. *Commissioners of Excise v. Hollister*, 2 Hilt. 588. He must, however, show the court specifically in what his defense

When power will be exercised.

consists. Mere general allegations will not answer. *Ellis v. Jones*, 6 How. 296. See *Hunt v. Wallis*, 6 Paige, 371; *Wells v. Cruger*, 5 id. 164. And it may be stated as a rule, that some excuse must be shown for neglecting to answer in time. *Cowton v. Anderson*, 1 How. 145; *Clark v. Lyon*, 2 Hilt. 91; *McKinstry v. Edwards*, 2 Johns. Cas. 113; *Spencer v. Webb*, 1 Caines, 118; *Cogswell v. Vanderberg*, id. 156. If the omission to answer in time was the result of accident or mistake, and without culpable negligence on the part of the defendant, and he has a good defense on the merits, leave will be given him to come in and defend. *Commissioner of Excise of New York city v. Hollister*, 2 Hilt. 588; *Quinn v. Case*, id. 467; S. C., 9 Abb. 160; *Macomber v. Mayor, etc., of New York*, 17 Abb. 37.

Where a party can show that a judgment is inequitable, the court will, in certain cases, entertain a motion to set it aside. In such case the party must show that the facts relied upon were unknown to him during the pendency of the former action, or that the fraud of the other party prevented his making a defense. *Hamil v. Grimm*, 10 Abb. 150. See *Wetmore v. Law*, 34 Barb. 515; S. C., 22 How. 130; *Clark v. Rowling*, 3 N. Y. (3 Comst.) 216, 222.

The following instances may serve to illustrate the manner in which the court exercises its discretion in opening a default. When the excuse was that both client and attorney had neglected to attend to the case, a default was opened, but upon stringent terms. *Selover v. Forbes*, 22 How. 477. And where the answer was prepared and verified but not served on account of the neglect of the attorney's clerk, it was held to be a sufficient excuse to warrant the opening of the default upon terms. *Clark v. Lyon*, 2 Hilt. 91. See, also, *Mann v. Provost*, 3 Abb. 446; *Barton v. McKinley*, 38 How. 283; *Elston v. Schilling*, 7 Rob. 74; S. C., 6 id. 544; S. C. affirmed, 42 N. Y. (3 Hand) 79.

It was formerly a well-settled rule that the court would never open a default to enable a defendant to set up an unconscientious or dishonest defense. *King v. Merchants' Exchange Co.*, 2 Sandf. 693; *Morris v. Slatery*, 6 Abb. 74; *Bard v. Fort*, 3 Barb. Ch. 632; *Parker v. Grant*, 1 Johns. Ch. 630. But the tendency of the later decisions is to relax this rule, and place all legal defenses, including those styled unconscionable, such as the statute of limitations, usury, etc., upon an equal footing in this respect. See *Sheldon v. Adams*, 41 Barb. 54; S. C., 18 Abb. 405; 27 How.

When power will be exercised.

179; *Union National Bank of Troy v. Bassett*, 3 Abb. N. S. 359. And in an action on a note, a default for want of an answer was set aside, and the defendant allowed to plead that the note was given for money won at play, and this even against a *bona fide* holder. *Bank of Kinderhook v. Gifford*, 40 Barb. 659. So after a default, a defendant may interpose the defense of a former adjudication. *Audubon v. Excelsior Fire Ins. Co.*, 10 Abb. 64. But a default will not be opened merely for the purpose of enabling a defendant to prove matter in mitigation of damages, as that can be done before the sheriff's jury. *Hays v. Berryman*, 6 Bos. 679. Nor will a judgment be opened merely to give a party a nominal advantage which can be of no material benefit to him. *De Peyster v. Hildreth*, 2 Barb. Ch. 109. And a judgment should not be opened to the prejudice of the plaintiff, merely that the defendant may interpose a counter-claim where there is no doubt shown as to the plaintiff's responsibility. *Lahey v. Kingon*, 13 Abb. 192; S. C., 22 How. 209.

Diligence is required on the part of the defendant who moves to be let in to defend on the merits after a default; hence, unreasonable delay is a strong objection to granting the motion. *Bliss v. Treadway*, 1 How. 245. And especially is it so regarded where the rights of the plaintiff against third persons have in the mean time become impaired. *N. Y. Life Ins. and Trust Co. v. Smith*, 2 Barb. Ch. 82.

The Code provides that in an action (except for divorce) a defendant or his representatives against whom judgment has been taken upon a summons served by publication may, upon good cause shown, be allowed to defend the action after judgment, at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just; and if such defense is successful, and the judgment has been enforced, in whole or in part, such restitution may thereupon be compelled, as the court may direct, but the title to property sold under such judgment to a purchaser in good faith cannot be affected. Code, § 135.

It should, however, be remembered that these provisions of the Code place no restrictions on the right or duty of the court to open a judgment taken upon a service void for want of jurisdiction. Judgment so taken must be opened at any time (*Titus v. Relyea*, 16 How. 371; S. C., 8 Abb. 177), even in an action for divorce where the prevailing party has married again. *Wortman*

Application, where and when made — Affidavits.

v. *Wortman*, 17 Abb. 66. See *Phelps v. Baker*, 60 Barb. 107; S. C., 41 How. 237.

Section 3. Application, where made. The motion to open a default can be made before any judge or judges holding a term other than that at which the judgment was taken. *Bolles v. Duff*, 56 Barb. 567. See *Ramsay v. Erie Railway Co.*, 9 Abb. N. S. 242. And in New York city the motion may be made before a justice out of court. Code, § 401; *Lowber v. Mayor, etc., of N. Y.*, 5 Abb. 325.

Section 4. Application, when made. The application to open a default should be made promptly. *Bogardus v. Livingston*, 2 Hilt. 236; S. C., 7 Abb. 428. And if there is delay, a satisfactory excuse should be furnished therefor. *Ib.*

The Code gives discretionary power to the court, at any time within one year after notice of a judgment, and upon such terms as may be just, to relieve a party from it when it has been taken against him through his mistake, inadvertence, surprise or excusable neglect. § 174; *Macomber v. Mayor, etc., of N. Y.*, 17 Abb. 35. But when the neglect is liable to work injustice to the plaintiff relief will not be granted. *Graham v. Pinckney*, 7 Rob. 147.

Where the parties reside within the jurisdiction of the court, and more than two years have elapsed since the entry of judgment and service of notice thereof upon the defendant, application to open the default will be refused. *Hendricks v. Carpenter*, 2 Rob. 625; S. C., 1 Abb. N. S. 213; S. C. affirmed, 4 Rob. 665; *Bliss v. Treadway*, 1 How. 245.

Section 5. Affidavits. On a motion to set aside a default, in actions for ordinary relief, a general affidavit of merits, made by the defendant and served with the notice of motion, is all that is required (*Dix v. Palmer*, 5 How. 293; S. C., 3 Code R. 214; *Van Horne v. Montgomery*, 5 How. 238; *Robinson v. Sinclair*, 1 id. 106; *Alberti v. Peck*, id. 230; *Stewart v. McMartin*, 2 id. 38; *Bogardus v. Doty*, id. 75), unless there are suspicious circumstances attending the case, in which event the affidavit must be special. *Dix v. Palmer*, 5 How. 293; S. C., 3 Code R. 214; *Ellis v. Jones*, 6 How. 296; *Van Horne v. Montgomery*, 5 id. 238. See *Moulton v. de ma Carty*, 6 Rob. 470.

An affidavit of merits being inappropriate in many cases, in actions for special relief, the proposed answer or its substance should be submitted to the court with the motion papers (*Hunt*

The order — Judgment as security — Costs on motion.

v. *Wallis*, 6 Paige, 371; *Winship v. Jewett*, 1 Barb. Ch. 173), unless the defendant is absent from the State, in which case security for the payment of the plaintiff's costs, in the event of the defense turning out to be groundless, may be required. *Wells v. Oruger*, 5 Paige, 164.

The fact that the defendant makes no affidavit of merits, on the motion to open a default, is not a conclusive answer to the application. It is a defect which may be supplied upon terms. *Fassett v. Tallmadge*, 15 Abb. 206.

Affidavits in opposition to an affidavit of merits are not, in general, received on a motion to open a default. *Hanford v. McNair*, 2 Wend. 286. See *Catlin v. Billings*, 4 Abb. 248; S. C., 13 How. 511. But if the court is fully satisfied that it is impossible for the defendant to prove the circumstances relied upon in his defense, that may be taken into view in disposing of the application. *Ib.* See *Ferussac v. Thorn*, 1 Barb. 42.

Section 6. The order.

Form of order denying or granting motion.

(Title of cause.)

(At a special term, etc.)

On reading and filing the affidavit of A. B. (and on the pleadings herein), and on motion of C. D., for the (defendant), and after hearing E. F., for the (plaintiff), (or, on proof of due service of notice of this motion, no one appearing) in opposition:

ORDERED: That the said motion be denied, with dollars costs. (Or, be granted, and the said judgment [*give description of judgment*] is hereby set aside, and the default [*or, inquest*] opened [as to], and the defendant let in to defend the action); (the judgment, however, and the execution issued thereon, are to stand as security for the plaintiff's claim, to abide the event of the action).

Section 7. Judgment as security. Where, on setting aside a default, a judgment is suffered to stand as a security, it exists merely as a security, and does not determine any right of the parties in the action; and there is no technical objection to taking precisely such future proceedings in that action as would be regular and requisite if no security had been given, or the judgment by default had never been entered. *Mott v. The Union Bank*, 8 Bosw. 591; S. C. affirmed, 38 N. Y. (11 Tiff.) 18; 35 How. 332; 4 Abb. N. S. 270; 4 Trans. App. 291.

Section 8. Costs on motion. It is the usual practice, on setting aside a regular judgment, to make the order conditional, requir-

Form of notice of motion to set aside irregular judgment by default.

ing payment of the costs incurred in entering it up. *Kane v. Demarest*, 13 How. 465. Where, however, a judgment is obtained by default through a misapprehension of the defendant's attorney, and it clearly appears that the plaintiff has no cause of action, which fact he should have known when he commenced proceedings, the judgment will be set aside, and the costs of the motion unconditionally awarded to the moving party. *Ib.*

Section 9. Appeal. An order granting or denying the motion to open a default is not, in general, reviewable on appeal. It is a matter resting in the sound discretion of the court, and it does not affect a substantial right. *Millard v. Van Ransst*, 17 Abb. 319 (n); *Churchill v. Mallison*, 2 Hilt. 70; *Ramsey v. Gould*, 4 Lans. 476. When made, however, in the palpable abuse of discretion, such an order may be reviewed on appeal. *Ib.*

Form of notice of motion to set aside regular judgment by default.

(Title of cause.)

(At a special term, etc.)

Please take notice, that on affidavits, copies of which are annexed (and copy of defendant's proposed answer herein also annexed), the undersigned will move the court at a special term to be held at _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard (or, will move before Mr. Justice _____, at his office in the city of _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon),* that the judgment entered by default against the defendant in this action, and all subsequent proceedings therein, be set aside,† upon such terms as to the court may seem just (and that the moneys levied thereon be restored to the defendant), with such other relief as may be just.

(Date.)

(Signature.)

(Address.)

Notice of motion to set aside irregular judgment by default.

(Same as preceding form to the †, and continue :) with costs, upon the ground, among others, of irregularity (specify each one relied on, e. g. thus): in that the judgment was entered by plaintiff in disobedience of a stay of proceedings, duly ordered and served on him, with such other relief as may be just.

When the motion is for irregularity, the notice or order must specify the irregularity complained of. Sup. Ct. Rule 46.

 Notice of motion to set aside inquest.

Notice of motion to set aside inquest.

(*Substitute for the words between the * and the † in the form preceding the last:*) that the inquest taken in this action, and all proceedings on the part of the plaintiff subsequent thereto, be set aside (*and continue as in that form*).

Order to show cause, obtained by a person not a party, but defrauded by the judgment.

(*Title of cause.*)

On the annexed affidavits, let all further proceedings be stayed under the execution issued on the judgment of D. F. against R. S., until the further order of this court; and on the annexed affidavits, and such as (*the moving party*) may serve upon D. F., the plaintiff, or his attorney, within days after the making of this order, let the said plaintiff show cause before this court, at a special term thereof, to be held in the said city of , on the day of next, at the opening of the court on that day, why the said judgment and execution issued thereon should not be set aside, as against the said (*moving party*), as fraudulent and void (and on the ground, among others, of irregularity in that *specifying the irregularity relied on*); and why said (*moving party*) should not have such other and further relief as may be just, and the costs of the motion.

(*Date.*)

(*Signature of judge.*)

Order to show cause why judgment and order of reference should not be set aside and defendant let in.

(*Title of cause.*)

On the pleadings in this cause, the order to refer and the papers on which the motion to refer was founded, on the judgment roll filed therein, and the report and finding of the referee, and on the affidavits and papers hereunto annexed (and on such other affidavits and papers as may be served upon the plaintiff's attorneys within two days prior to the time of hearing herein mentioned), let the plaintiff and his said attorneys show cause before one of the justices of this court, at chambers, on, etc., , why the judgment entered in this action should not be set aside and vacated; why the order of reference therein should not be set aside; why the defendants therein should not be permitted to file a further or annexed answer to the complaint in this action, and why the issues joined in the said action should not be tried by a jury, or for such other or further order as the said court may deem meet. And in the mean time, and until the hearing and determination of the motion under this order, let all proceedings upon the execution issued upon the said judgment be stayed.

(*Date.*)

(*Signature of judge.*)

CHAPTER V.

JUDGMENT ON OFFER.

ARTICLE I.

NATURE OF PROCEEDING.

Section 1. In general. Under the former system of practice, a party who had commenced an action was not compelled to receive a *cognovit*, but could proceed and take judgment by default. But the Code has introduced a broader remedy which is a substitute for the *cognovit* under the old practice. *Ross v. Bridge*, 15 Abb. 150; S. C., 24 How. 163. By this remedy the defendant is permitted to make an offer that judgment be taken against him to the effect specified in such offer, with costs, and the plaintiff is bound to accept it and enter judgment in accordance with the offer, or reject it at the risk of losing costs if he fails to obtain a more favorable judgment than that offered. Code, § 385.

This proceeding is intended to enable parties to compromise actions to which there is no defense, or only a partial defense, by agreeing upon the amount of damages, and thus effect a saving of costs. It was the intention of the law-framers to have this provision apply to those cases where the defendant concedes the cause of action to an amount less than that claimed, or is willing to concede something rather than litigate. But in actual practice the provision has been turned from its proper purpose and made to supply the place of a confession of judgment without action, so as to dispense with the necessity of the oath of the party that the transaction is in good faith. The courts decline to say that such a practice must not be tolerated, but it is evidently contrary to the good intent of the law-framers and subversive of the protection which they have endeavored to give to creditors against scheming debtors, and should, on this account if on no other, be discouraged. See *Bridenbecker v. Mason*, 16 How. 203.

In what cases and at what stage allowed—Offer, by whom made.

ARTICLE II.

IN WHAT CASES AND AT WHAT STAGE ALLOWED.

Section 1. In what cases. The offer provided for by section 385 of the Code is not confined to actions upon contracts, or to actions against a sole defendant. *Bridenbecker v. Mason*, 16 How. 203. It may be made in actions for either legal or equitable relief, whether there be one or several defendants. *Pomeroy v. Hulin*, 7 How. 161. See, also, *Marble v. Lewis*, 53 Barb. 432; S. C., 36 How. 337.

Section 2. At what stage. The offer may be made at any time before trial or verdict. Code, § 385. But if defendant desires to avail himself of the provision, he should make the offer at least ten days before trial; for if the cause is reached and tried before the expiration of the ten days within which the plaintiff may accept the offer, the rights of the parties are, in all respects, the same as if no offer had been made. *Pomeroy v. Hulin*, 7 How. 161.

The offer amounts to a stay of proceedings on the part of the defendant for the term of ten days, or until the plaintiff makes his election; hence, the defendant cannot proceed and obtain a judgment by default if the cause is reached on the calendar within that time. *Walker v. Johnson*, 8 How. 240.

The offer may be made before the service of the complaint (*Kilts v. Seeber*, 10 How. 270) and the amendment of the complaint enlarging the plaintiff's demand, although it calls for a new answer of additional matter, will not deprive the defendant of the benefit of his offer, in case the plaintiff fails to recover a more favorable judgment than that offered. *Ib.* See *Tompkins v. Ives*, 30 How. 13; S. C. affirmed, 36 N. Y. (9 Tiff.) 75; 1 Trans. App. 266; 3 Abb. N. S. 267.

ARTICLE III.

OFFER, BY WHOM MADE.

Section 1. By defendant.

a. In general. The offer of judgment is to be made by the defendant. Code, § 385. An offer signed by the attorney for

Offer in case of joint debtors.

the defendant, is equivalent to one signed by himself. *Sterne v. Bentley*, 3 How. 331; S. C., 1 Code R. 109. The rule is that, where the defendant appears by attorney, the offer should be made and subscribed by the latter; but if, in such a case, the offer is made by the defendant in person, leave of the court should be obtained to enter judgment upon it. *Webb v. Dill*, 18 Abb. 264.

b. In case of joint debtors. Where joint debtors are defendants there are several classes of cases which arise, and which we will notice separately:

First. Where an attorney of the court appears regularly for the defendants, an offer made by him will be valid, unless fraud or collusion between him and the plaintiff is shown, or unless it appears that the defendant's attorney is irresponsible, in which case the court will relieve against the judgment. *Blodget v. Conklin*, 9 How. 442; *Everson v. Gehrman*, 10 id. 301; S. C., 1 Abb. 167; *Bridenbecker v. Mason*, 16 How. 203; *Griswold v. Griswold*, 14 id. 446; *Grazebrook v. M'Creddie*, 9 Wend. 437; *Binney v. Le Gal*, 19 Barb. 592; S. C., 1 Abb. 283. If the attorney has not been authorized to appear for all the parties against whom judgment has been entered, the court will permit the defendant aggrieved to plead if he has a defense, the judgment in the mean time standing as security. *Blodget v. Conklin*, 9 How. 442; *Everson v. Gehrman*, 10 id. 301; S. C., 1 Abb. 167; *Sterne v. Bentley*, 3 How. 331; S. C., 1 Code R. 109; *Grazebrook v. M'Creddie*, 9 Wend. 437. See *Lahey v. Kingon*, 13 Abb. 192; S. C., 22 How. 209.

Second. Where all the defendants are served with process, the offer must be signed by all whose time to answer has not expired, or by an attorney who appears for all the defendants. *Bridenbecker v. Mason*, 16 How. 203; *La Forge v. Chilson*, 3 Sandf. 752; S. C., 1 Code R. N. S. 159; *Binney v. Le Gal*, 1 Abb. 283; S. C., 19 Barb. 592. Thus one partner cannot offer judgment on behalf of his co-defendant, where both have been served with process; and a judgment entered on such an offer will be set aside as against such co-defendant. *Bridenbecker v. Mason*, 16 How. 203; *Binney v. Le Gal*, 1 Abb. 283; S. C., 19 Barb. 592. Where some of the defendants allow their time for answering to expire, the others may make the offer. *La Forge v. Chilson*, 3 Sandf. 752; S. C., 1 Code R. N. S. 159.

Offer, how made — Requisites of.

Third. Where only one of several joint debtors has been served with process, he may make an offer of judgment which, when entered, will bind the joint property of the defendants not served, and the individual property of the one who made the offer (*Bridenbecker v. Mason*, 16 How. 203; *Emery v. Emery*, 9 id. 130; *Lippman v. Joelson*, 1 Code R. N. S. 161, *note*; *Orwell v. McLaughlin*, 10 N. Y. Leg. Obs. 316), but if such an offer is made by collusion between the plaintiff and the defendant served, the judgment will be set aside. *Everson v. Gehrman*, 1 Abb. 167; S. C., 10 How. 301.

ARTICLE IV.

OFFER, HOW MADE.

Section 1. Must be in writing.

a. In general. The offer must be in writing (Code, § 385; *Bridenbecker v. Mason*, 16 How. 203), and must specify the judgment which the defendant will allow, with costs. *Ib.*

b. Requisites of offer. The offer should be so distinctly and openly made that there can be no doubt or misunderstanding about it (*Post v. New York Central Railroad Company*, 12 How. 552), and should be such a practical one that the plaintiff may avail himself of it at once and absolutely without seeking the aid or permission of the court, and without prejudicing his rights as to other parties; thus an offer is insufficient if it involves the necessity of severing the action (*Griffiths v. De Forest*, 16 Abb. 292; S. C., 25 How. 336; *Marble v. Lewis*, 53 Barb. 432; S. C., 36 How. 337), or if it is conditional, as where it provides that upon certain proof being made the clerk may enter judgment. *Pinkney v. Childs*, 7 Bosw. 660; S. C., 15 Abb. 137, *note*.

But it is not absolutely necessary that the offer should specify the sum for which judgment may be taken. If it intelligibly refer to the pleadings, so that the clerk, by a simple computation, can ascertain the amount of the judgment, it is sufficient; as where it offers judgment for the amount claimed on the first cause of action set forth in the complaint, or where it offers judgment for the amount claimed in the complaint less the amount of two notes set forth in the answer. *Burnett v. Westfall*, 15 How. 420; S. C. affirmed, on appeal, *id.* 425, *note*.

In case the offer is made before answer, if the defendant in-

The signing of the offer.

tends to set up a counter-claim in his answer, he should so refer to it in his offer, that it will be extinguished upon the acceptance of the offer; for if the defendant omits to embrace a discharge of his set-off in the offer, and the plaintiff recovers a judgment which, including the extinguished counter-claim, is larger than that offered by the defendant, the latter cannot claim the benefit of his offer. *Tompkins v. Ives*, 36 N. Y. (9 Tiff.) 75; S. C., 1 Trans. App. 266; 3 Abb. N. S. 267; affirming S. C., 30 How. 13; *Ruggles v. Fogg*, 7 id. 324.

The better practice would be to renew the offer after answer if a counter-claim is set up, as the import and effect of the offer is determined by the state of the pleading at the time the offer is made. See *Tompkins v. Ives*, 36 N. Y. (9 Tiff.) 75; S. C., 1 Trans. App. 266; 3 Abb. N. S. 267; affirming S. C., 30 How. 13.

A judgment entered on an offer which allows judgment for the whole of the plaintiff's claim is valid, although the court has power to set aside such a judgment where it appears that the proceeding was taken by collusion, and is in fraud of the rights of creditors under the provisions of sections 382 and 383 of the Code. *Ross v. Bridge*, 15 Abb. 150; S. C., 24 How. 163. See chap. 1 of this Title.

The offer must expressly state that the judgment may be taken *with costs*, or it will be a nullity. *Ranney v. Russel*, 3 Duer, 689. See *Johnson v. Sagar*, 10 How. 552.

c. The signing. The offer must be signed by the defendant or his attorney, or by an agent specially authorized to sign it in his name. *Bridenbecker v. Mason*, 16 How. 203.

If the defendants are joint debtors, it must be signed by or in behalf of all the defendants served with process whose time for answering has not expired. *Ib.*; *Griffiths v. De Forest*, 16 Abb. 292; S. C., 25 How. 336; *Brusle v. Gilmer*, 16 Abb. 292, *note*; *La Forge v. Chilson*, 3 Sandf. 752; S. C., 1 Code R. N. S. 159. If only one defendant has been served with process, he may make the offer, and the judgment entered therein will bind the joint property of all. *Paton v. Wright*, 15 How. 481.

The implied agency resulting from the relation of the parties, where the defendants are partners, does not extend to offering judgment, under section 385 of the Code, if both defendants have been served with process. *Binney v. Le Gal*, 1 Abb. 283; S. C., 19 Barb. 592; *Bridenbecker v. Mason*, 16 How. 203.

 Proceedings subsequent to offer.

d. Service. The offer must be served upon the plaintiff's attorney. Code, § 385.

Form of offer to allow judgment.

(*Title of cause.*)

The defendant (*naming him, if one of several*) offers to allow judgment to be taken against him (*or, against the defendants herein*) by the plaintiff, for (*specify the sum, property, or specific relief intended*), with costs.

(*Date.*) (Signature of defendant or his attorney.)

(*Address to plaintiff's attorney.*)

ARTICLE V.

PROCEEDINGS SUBSEQUENT TO OFFER.

Section 1. Plaintiff's proceedings.

a. Not stayed. The plaintiff may proceed, in all respects, as if no offer had been made. *Pomeroy v. Hulin*, 7 How. 161.

If a trial is had before the expiration of the ten days in which the plaintiff may accept the offer, the rights of the parties are in all respects the same as if no offer had been made. *Ib.*

b. Amendment by plaintiff. Any amendment which the plaintiff may make will not deprive the defendant of the benefit of his offer made previous to such amendment. *Kilts v. Seeber*, 10 How. 270.

c. Acceptance. The plaintiff has, in all cases, ten days in which to accept the offer. *Pomeroy v. Hulin*, 7 How. 161.

If he accepts it he must serve a notice to that effect upon the defendant's attorney, within ten days. Code, § 385.

Notice of acceptance of offer.

(*Title of cause.*)

Take notice, that the plaintiff accepts the offer of the defendant, allowing him to take judgment in this action (for dollars), with costs.

(*Date.*)

(*Signature.*)

(*Address.*)

Notice of an election on the part of the plaintiff to accept the offer cannot be made by *parol* so as to deprive him of the benefit of the ten days. *Walker v. Johnson*, 8 How. 240.

d. Entering judgment. Upon serving such notice of acceptance, the plaintiff may file the summons, complaint and offer,

Affidavit of service of notice of acceptance.

with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly (Code, § 385); that is, according to the offer. *Burnett v. Westfall*, 15 How. 420.

The judgment may be entered without the direction of a judge of the court (*Hill v. Northrop*, 9 How. 525), and an offer which would compel an application to the court before judgment could be entered is not regular, and may be disregarded. *Griffiths v. De Forest*, 16 Abb. 292; S. C., 25 How. 336.

In making up the judgment roll a copy of the notice of acceptance should be inserted with an affidavit of service.

Affidavit of service of notice of acceptance.

COURT.

A. B., plaintiff, agt. C. D., defendant.
--

COUNTY OF _____, ss.:

G. H., being duly sworn, says, that he is the attorney for the plaintiff in this action; that on the _____ day of _____, 187 , and before any trial or verdict herein, the defendant in said action appeared by E. F., his attorney, and served upon said attorney for the plaintiff the foregoing offer, in writing, signed by said defendant's attorney, to allow judgment to be taken against the defendant in this action for the sum of _____ dollars and _____ cents with costs.

Deponent further says, that on the _____ day of _____, 187 , and within ten days after the service of said offer as aforesaid, the plaintiff accepted the same, and served a notice thereof, in writing, upon said defendant's attorney, and that the foregoing paper, entitled Copy Notice of Acceptance, is a true copy of the notice so served.

Deponent further says that the items of expense and disbursements embraced in the annexed bill of costs have been, or will be, necessarily incurred by the plaintiff in this action, according to deponent's knowledge or belief.

Subscribed and sworn before me, this } G. H.
day of _____, 187 . }

Judgment on offer and acceptance.

A. B., plaintiff, agt. C. D., defendant.
--

Judgment the _____ day of _____, 187 ,
at _____ h. _____ m. _____ M.

The summons, with a copy of the complaint in this action, having been duly served on the above-named defendant, and the

 Rejection of offer — What is a more favorable judgment.

said defendant having appeared in said action by E. F., his attorney, and served on the plaintiff an offer, in writing, to allow judgment to be taken against him herein for the sum of dollars and cents, and the plaintiff having accepted said offer and served a notice thereof in writing upon the defendant: now, on filing the said summons complaint and offer, and notice of acceptance, together with an affidavit of such notice of acceptance, on motion of G. H., plaintiff's attorney, it is hereby adjudged and determined by the court that the plaintiff recover of the defendant the sum of dollars and cents, with dollars and cents costs and disbursements, amounting in the whole to \$, and have execution therefor.

M. W., *Clerk.*

e. Rejection of offer. If the notice of acceptance is not served within ten days after the offer is made, the offer is deemed to be withdrawn, and cannot be given in evidence. Code, § 385.

f. Effect of non-acceptance. If the plaintiff fails to obtain a more favorable judgment than that offered by the defendant he cannot recover costs, but must pay the defendant's costs from the time of the offer. Code, § 385. And where, in an action for debt, the plaintiff accepts an offer to enter judgment for less than \$50, the defendant is entitled to costs. *Johnson v. Sagar*, 10 How. 552.

g. What is a more favorable judgment. A judgment against all the defendants who are joint debtors is more favorable than a judgment for the same amount against a part only of such defendants. *Griffiths v. DeForest*, 16 Abb. 292; S. C., 25 How. 336. In case of a money demand, if the verdict is made up of principal and the interest which has accrued thereon, in order to ascertain which is most favorable to the plaintiff, the interest which has accrued intermediate the time of the offer and the rendition of the judgment is to be rejected therefrom. The test is the sum due for principal and interest at the time of the offer, and not that sum increased by the interest accruing from the date of the offer to the date of the verdict. *Budd v. Jackson*, 26 How. 398; *Schneider v. Jacobi*, 1 Duer, 694; S. C., 11 N. Y. Leg. Obs. 220. Adding interest to the amount of the offer from its date to the date of the verdict will decide the question on the same principle. *Ruggles v. Fogg*, 7 How. 324.

If the offer is served after an answer which sets up a counterclaim, the acceptance of the offer would extinguish all the claims

 Costs before offer — Entry of judgment — Defendant's proceedings.

set up in the answer; so that if the plaintiff pursues the litigation he cannot recover costs unless his actual recovery exceeds the amount of the offer (*Schneider v. Jacobi*, 1 Duer, 694; S. C., 11 N. Y. Leg. Obs. 220); and acceptance of the offer has the same effect upon counter-claims if the offer is served *with* the answer. *Kilts v. Seeber*, 10 How. 270.

But where the answer is served *after the offer*, and such answer sets up a counter-claim which is extinguished by the verdict, the amount of the plaintiff's actual recovery must be added to the amount of the extinguished claim, and if together they exceed the amount of the defendant's offer, the plaintiff has a more favorable judgment. *Ruggles v. Fogg*, 7 How. 324; *Fieldings v. Mills*, 2 Bosw. 489; *Tompkins v. Ives*, 36 N. Y. (9 Tiff.) 75; S. C., 3 Abb. N. S. 269; 1 Trans App. 266; affirming S. C., 30 How. 13.

h. Costs before offer. The plaintiff will be allowed costs up to the time of the offer. *Burnett v. Westfall*, 15 How. 430; *Keese v. Wyman*, 8 id. 88. Such costs should always be allowed to the plaintiff. *Ranney v. Russell*, 3 Duer, 689. See *Johnson v. Sagar*, 10 How. 552.

i. Entry of judgment. Where the plaintiff has a recovery, but the defendant is entitled to costs, the costs should be set off against the recovery and but one judgment entered for the excess, to whichever party it belongs. *Johnson v. Farrell*, 10 Abb. 384. See "Setting off Costs."

Section 2. Defendant's proceedings.

a. Stayed. The service of the offer amounts to a stipulation, on the part of the defendant, that he will not take any steps in the action *contrary to the terms of the offer* for the term of ten days. The plaintiff is absolutely entitled to a judgment according to the offer at any time within ten days. Hence, if the defendant proceeds at the circuit within that time, and obtains an order dismissing the complaint, such order will be set aside, upon motion. *Walker v. Johnson*, 8 How. 240.

b. Extra allowance. According to the construction of section 309 of the Code by WILLARD, J., if the plaintiff has a recovery, although it is less than the amount of the offer, the defendant cannot have an extra allowance of costs in any case. *M'Lees v. Avery*, 4 How. 441; S. C., 3 Code R. 104. See *Burnett v. Westfall*, 15 How. 430.

ARTICLE VI.

OFFER TO COMPROMISE BY PLAINTIFF.

Section 1. When to be made. In any action where the defendant sets up in his answer a counter-claim greater than the plaintiff's claim, or sufficient to reduce the plaintiff's claim below \$50, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow the counter-claim to the amount specified, with costs. Code, § 385.

Section 2. Acceptance and judgment. If the defendant accepts the offer, he must do so within ten days, by serving a notice to that effect upon the plaintiff's attorney. Code, § 385.

If he accepts the offer he may have judgment entered by filing the summons and complaint, the answer, offer, and affidavit of notice of acceptance with the clerk, if the offer entitles him to judgment. Or if the offer is an allowance of a portion of his claim he is entitled, upon acceptance, to have so much of it as is specified in the offer allowed to him upon the trial. Code, § 385.

Section 3. Non-acceptance and its effect. If the defendant does not serve a notice of acceptance within ten days, the offer is deemed to be withdrawn and cannot be given in evidence. Code, § 385.

If the defendant fails to recover a more favorable judgment than that offered; or if he fails to establish his counter-claim to an amount greater than that specified in the plaintiff's offer, he cannot recover costs, but must pay the plaintiff's costs from the time of the offer. Code, § 385.

Section 4. Practice under this provision. The rules of practice laid down in this title which control upon an offer of judgment by the defendant are equally applicable to the offer by the plaintiff—the relation of the parties being changed, the plaintiff practically becoming defendant and the defendant becoming plaintiff. The general principles governing the practice are the same under each provision.

CHAPTER VI.

JUDGMENT BY CONFESSION.

ARTICLE I.

NATURE OF PROCEEDING.

Section 1. Under former practice. It was an ancient and well-settled practice of the courts to allow judgments to be recovered by confession either without action or pending an action, and such judgments rested, as they still do, upon the simplest of all foundations—that of consent. Formerly, consent was sufficient without a definite and particular statement of the consideration of the debt, even as to other creditors and purchasers, but the practice was liable to abuses, to obviate which the legislature, in 1818, enacted a statute which required that, upon a confession of judgment without suit, the plaintiff should file with the record a particular statement of his debt, and if this was omitted the judgment was deemed fraudulent as to other judgment creditors and *bona fide* purchasers for value of lands bound by such judgment. See Laws of 1818, ch. 258, § 8.

This statute was repealed prior to 1830, and the Revised Statutes required that the authority for entering the judgment should be in some instrument distinct from the bond or evidence of the debt, and should be produced to the officer signing the record, and should be filed with the record. 2 R. S. 360.

Section 2. Under the Code. Such was the practice until the adoption of the Code, which provides for the entry of a judgment in the supreme or superior court upon confession, without action, either for a demand already accrued, or to secure a contingent liability; and in order to close the door against fraud, it is further provided that a verified statement in writing must be made authorizing the entry of judgment for a specified sum; if it be for an amount due or to become due, it must state concisely the facts out of which it arose, and must show that it is justly due or to become due; if it is to secure against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed such liability. Code, §§ 382, 383. The object of the provision

In what cases.

being to afford all the benefits of an action to the intended plaintiff without the corresponding expense to the defendant, and at the same time to permit fraudulent or pretended judgments, the authority to enter judgment must be clear and explicit, and all the facts which constitute the legal obligation should be placed upon the record. *The Manufacturers and Mechanics' Bank of Philadelphia v. St. John*, 5 Hill, 497; *Purdy v. Upton*, 10 How. 494. See *Mosher v. Heydrick*, 45 Barb. 549; S. C., 30 How. 161; 1 Abb. N. S. 258. It will be remembered that a confession of judgment may be taken in a court of a justice of the peace to an amount not exceeding \$500, but such confession must be in accordance with the provisions of article 8, title 4, chapter 2 of part 3 of the Revised Statutes. Code, § 53, subd. 8. See 2 Wait's Law & Prac. 702.

ARTICLE II.

IN WHAT CASES.

Section 1. Must be a debt due, or to become due, or a contingent liability. The case provides that a judgment by confession may be entered without action, either: 1. For money due; 2. For money to become due; 3. To secure any person against a contingent liability on behalf of the defendant; or, 4. For liability already accrued, and to secure against a contingent liability. Code, § 382.

Under these provisions there must be either a *debt* due, or to become due, or a *contingent liability*; and a confession of judgment cannot be made under section 382 of the Code for damages occasioned by a tort. *Burkham v. Van Saun*, 14 Abb. N. S. 163; *Boutel v. Owens*, 2 Sandf. 655; S. C., 2 Code R. 40.

It would seem that these provisions do not admit of a confession of judgment in an action already commenced. *Boutel v. Owens*, 2 Sandf. 655; S. C., 2 Code R. 40. Probably this is true, the proper proceeding in such a case being under section 385 of the Code.

It is, however, beyond doubt that if the defendant is in custody, a judgment entered upon his confession without the presence and advice of an attorney would be void. Although the courts of this State have never adopted, in terms or rule to that effect, yet they follow, in this respect, the strict practice of the English

In what cases — By whom confessed.

courts. *Boutel v. Owens*, 2 Sandf. 655; S. C., 2 Code R. 40; *Wilder v. Baumstark*, 3 How. 81.

A judgment may be confessed to secure a contingent liability to the extent of such judgment; but if advances are subsequently made or liabilities are subsequently incurred to the amount of the judgment, such judgment cannot be available as a security for other advances or liabilities, although in the end, by payments made to or funds received by the creditor, the liabilities incurred from time to time should be satisfied so that the balance does not exceed the sum specified in the security. It cannot be regarded as a continuing security, covering the *final* balance. In other words, when a judgment is confessed to secure future liabilities, and such liabilities are incurred by the debtor to the amount of the judgment and paid, the judgment cannot stand as a continuing security for further advances or for the final balance of a current account between the parties. *Truscott v. King*, 6 N. Y. (2 Seld.) 147.

The reading of the 382d section is: "to secure any person against a contingent liability," etc. The person to be secured is the plaintiff in the judgment; thus a confession is not good which is given to A, as trustee for B, to secure the latter against contingent liabilities assumed by him. *Marks v. Reynolds*, 12 Abb. 403.

ARTICLE III.

BY WHOM CONFESSED.

Section 1. Partners. Under the existing provisions a judgment by confession, without action, can only be entered against the person who signs the confession; and hence, one of two partners or joint debtors cannot confess a judgment for both. *Stoutenburgh v. Vandenburg*, 7 How. 229. See *Everson v. Gehrman*, 10 How. 301; S. C., 1 Abb. 167; *Graser v. Stellwagen*, 25 N. Y. (11 Smith) 315. A judgment confessed by one partner would be valid against him, but does not bind the partnership property except to the extent of the interest of the party signing the confession. *Stoutenburgh v. Vandenburg*, 7 How. 229.

Section 2. Married women. At common law a judgment entered upon the confession of a married woman was undoubtedly void. *Watkins v. Abrahams*, 24 N. Y. (10 Smith) 72; affirming S. C., 14 How 191. In *Roraback v. Stebbins* the court

Public officer—Lunatic—To whom given.

of last resort decided that such a judgment was not void, but *voidable* only, and that it might be impeached by existing judgment creditors at the time of the levy and sale thereunder. See *Roraback v. Stebbins*, 3 Keyes, 62; S. C., 33 How. 281. But those cases arose and were decided upon judgments which were confessed previous to the statutes of 1860 and 1862 which authorize married women to sue and to be sued in courts of law, and authorize also in such cases *personal judgments* to be entered against them for damages and costs. Laws of 1860, ch. 90; Laws of 1862, ch. 172.

It seems to necessarily follow from the construction which the courts have placed upon these statutes, and the evident intent of the legislature, that a married woman may, in respect to her separate property, confess a judgment which will be valid and binding. *First National Bank of Canandaigua v. Garlinghouse*, 36 How. 369; S. C., 53 Barb. 615.

Section 3. Public officer. A public officer who is liable to be sued for services rendered for the public at his request, may confess a judgment for the amount. *Gere v. Supervisors of Cayuga*, 7 How. 255.

But those interested are not concluded by such a judgment, but may go behind it and inquire into the consideration. *Ib.*

Section 4. Lunatic. A judgment entered upon the confession of one who is subsequently pronounced of unsound mind, if taken in good faith is not absolutely void, but the court may order it set aside on proper terms. *Person v. Warren*, 14 Barb. 488.

ARTICLE IV.

TO WHOM GIVEN.

Section 1. Construction of section 382. The language of section 382 of the Code is, that a judgment may be confessed to secure any person, etc. The person to be secured is the plaintiff in the judgment. Thus a judgment confessed to A to secure him, and as trustee for another to secure a contingent liability assumed by the latter, is illegal as against subsequent creditors. *Marks v. Reynolds*, 12 Abb. 403.

Section 2. Assignee. The provisions of the Code with reference to the confession of judgments are intended to avoid fraud, and hence if an improper security is thus given to a creditor it

The statement — Its sufficiency.

will be declared void. As where a judgment was confessed to a person to whom the debtor had previously made a fraudulent assignment in trust for the benefit of creditors, and who still claimed under such assignment and sought to enforce it, the judgment was declared void; and the court held that if the creditor would avail himself of the benefits of the judgment he must abandon the assignment. *D'Ivernois v. Leavitt*, 23 Barb. 63.

ARTICLE V.

THE STATEMENT.

Section 1. When sufficient.

a. In general. Section 383 of the Code provides that a statement in writing must be made, signed by the defendant and verified by his oath, to the following effect:

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

2. If it be for money due or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability and must show that the sum confessed therefor does not exceed the same. Code, § 383.

Under the law of 1818 the statement was required to be as special and precise as a bill of particulars (see *Lawless v. Hackett*, 16 Johns. 149), but the Code does not require that minuteness, and it is sufficient that the nature and the consideration of the debt confessed, the time in which it accrued, and that it is due and unpaid is concisely stated (*Gandall v. Finn*, 1 Keyes, 217; S. C., 33 How. 444; *Hopkins v. Nelson*, 24 N. Y. [10 Smith] 518; *Neusbaum v. Keim*, id. 325; *Freligh v. Brink*, 22 N. Y. [8 Smith] 418; *Lanning v. Carpenter*, 20 N. Y. [6 Smith] 447); appropriate information must, however, be fully given, and if the statement fails in this respect the judgment may be vacated as fraudulent and void on a motion made by a junior judgment creditor of defendant, or by a *bona fide* purchaser or mortgagee of lands on which the judgment is an apparent lien. *Chappel v. Chappel*, 12 N. Y. (2 Kern.) 215; *Daly v. Matthews*, 20 How. 267; S. C.,

For goods sold — Promissory note.

12 Abb. 403 (n.); *Norris v. Denton*, 30 Barb. 117; *Kendall v. Hodgins*, 1 Bosw. 659; S. C., 7 Abb. 309.

b. *For goods sold.* The statement of "facts" upon which the debt arose in the statement for a confession of judgment upon an account for goods sold is sufficient if it sets forth the nature of the goods purchased, the time within which they were bought, and that they are not paid for (*Clements v. Gerow*, 1 Keyes, 297; *Gandall v. Finn*, id. 217; S. C., 33 How. 444; *Daly v. Matthews*, 29 id. 267; S. C., 12 Abb. 403 (n.); *Curtis v. Corbitt*, 25 How. 58; *Delaware v. Ensign*, 21 Barb. 85); and where a schedule was referred to for the particulars of the account the statement was held sufficient, although in fact no schedule was annexed. *Clements v. Gerow*, 1 Keyes, 297.

c. *Promissory note.* The statement to authorize the entry of a judgment upon a promissory note should set out the note particularly as to parties, date and amount, and also the consideration of the note. Thus where, after setting out the note, it was added that the note was given for borrowed money, it was held sufficient (*Lanning v. Carpenter*, 20 N. Y. [6 Smith] 447), and a statement was held sufficient in which, after setting out a note for \$700, it was added "that amount of money being had by the defendants of the plaintiff." *Freligh v. Brink*, 22 N. Y. (8 Smith) 418. See *Acker v. Acker*, 1 Keyes, 291. It is not sufficient in such a case merely to set out the note with an allegation that the amount of it is justly due (*Chappel v. Chappel*, 12 N. Y. [2 Kern.] 215), or with the statement that it was given upon a settlement between the debtor and the creditor. *Dunham v. Waterman*, 17 N. Y. (3 Smith) 9; S. C., 6 Abb. 357. But where copies of notes are annexed to the statement, and their consideration is fairly set forth, it will be held sufficient; as where it was alleged that the defendant had purchased a certain indebtedness, and had given the plaintiff four notes therefor, copies of which were annexed; and the court said it is not necessary to set forth the consideration of the debt purchased, for that is mere matter of description. *Kirby v. Fitzgerald*, 31 N. Y. (4 Tiff.) 417. If a note is given upon a settlement of accounts, the nature of the account should be stated. *Kellogg v. Cowing*, 33 N. Y. (6 Tiff.) 408. See *Dunham v. Waterman*, 17 N. Y. (3 Smith) 9; S. C., 6 Abb. 357.

It will be the best course in all cases to give such a particular statement of the consideration that parties interested may see

Money lent — To secure a contingent liability — The signature.

from the statement itself that it is genuine and free from fraud. *Moody v. Townsend*, 3 Abb. 375.

d. Money lent. In confessing judgment for money lent, there should be a statement of the amount and the time when it was advanced, and whether on one or several occasions. *Frost v. Koon*, 30 N. Y. (3 Tiff.) 428; *Stebbins v. The East Society of the Methodist Episcopal Church of Rochester*, 12 How. 410; *Daly v. Matthews*, 12 Abb. 403(n); S. C., 20 How. 267.

A statement of "facts," in such a case, was held sufficient, which was as follows: "For money lent by said plaintiff to me on the first day of April, 1856, and interest thereon from the first day of April, 1857." *Clements v. Gerow*, 1 Keyes, 297.

e. To secure a contingent liability. Section 383 of the Code requires that there must be a concise statement of facts constituting the liability, and must show that the sum confessed therefor does not exceed the same. Most of the cases which arise under this clause of section 383 are those where parties have made themselves contingently liable as indorsers, etc., of notes; and, in such cases, it is not necessary to set out the particulars of each note upon which the party may become liable, but a statement was held sufficient as to the facts constituting the liability, etc., that "the plaintiff has this day indorsed my notes, payable at bank, for \$6,000 in all, for my accommodation, and to enable me to negotiate said notes," without any other description of the notes. *Hopkins v. Nelson*, 24 N. Y. (10 Smith) 518.

The object of the statement is, in such a case, as declared by the commissioners of the Code in their report, that the record may state the truth, and show that the judgment is but security and its binding effect contingent, "so that its (the judgment's) purpose or intent cannot be denied or concealed." *Ib.*

The statement should describe the nature of the liability, whether it is as "surety" or "indorser," etc. (*Dow v. Platner*, 16 N. Y. [2 Smith] 562; *Hopkins v. Nelson*, 24 N. Y. [10 Smith] 518), and should show, clearly, how or why the plaintiff may become liable. *Winnebrenner v. Edgerton*, 30 Barb. 185; S. C., 8 Abb. 419; 17 How. 363.

It is better, in any case, to have the statement contain more than is strictly necessary, rather than in endeavoring to be "concise," to give opportunity for questioning the judgment.

Section 2. The signature. The Code requires that the statement in writing must be signed by the defendant. Code, § 383.

Verification — Amendment of statement.

The statement itself should be signed by the defendant, but where the statement and verification were on the same page, and the party confessing the judgment put his signature to the affidavit only, it was held a substantial compliance with the statute. *Purdy v. Upton*, 10 How. 494; *Post v. Coleman*, 9 id. 64.

Section 3. Verification. The statement must be verified by the oath of the defendant. Code, § 383. The verification should be a direct affirmation that the statement is true, so far as it relates to matters within his own knowledge; and, if a party swears that he "believes the above statement of confession is true," such verification is insufficient, and the judgment entered thereon will be vacated. *Ingram v. Robbins*, 33 N. Y. (6 Tiff.) 409.

It is not a valid objection to the verification that it was made before one of the plaintiff's attorneys. *Post v. Coleman*, 9 How. 64.

Statement and confession of judgment without action.

COURT — COUNTY OF

John Smith, plaintiff,	}
agst.	
John Jones, defendant.	

I, John Jones, defendant, do hereby confess judgment in this court in this action in favor of John Smith, plaintiff, for the sum of _____, and hereby authorize him or his heirs, executors, administrators or assigns to enter judgment therefor against me for that amount.

This confession of judgment is for a debt or liability justly due to the said plaintiff, arising upon the following facts, viz.: (*State the facts clearly and fully.*)

JOHN JONES, Defendant.

COUNTY OF _____, ss.:

John Jones, being duly sworn, says he is the defendant above named, and that the matters stated in the above confession are true.

Subscribed and sworn to before me, }
this _____ day of _____, 187 . }

Section 4. Amendment of statement.

a. Supreme court may order amendment. The supreme court has power to amend the statement and confession, so as to preserve the lien, and its determination in such matter is not reviewable on appeal to the court of appeals. *The Union Bank v. Bush*, 36 N. Y. (9 Tiff.) 631; S. C., 3 Trans. App. 235; *Mitchell*

At what stage — In what cases — The judgment.

v. Van Buren, 27 N. Y. (13 Smith) 300. See *Hopkins v. Nelson*, 24 N. Y. (10 Smith) 518.

b. At what stage. An amendment of the statement may be ordered upon the hearing of a motion made by a subsequent judgment creditor to set aside the confessed judgment for the insufficiency of the statement. *Mitchell v. Van Buren*, 27 N. Y. (13 Smith) 300.

This decision practically overrules *McKee v. Tyson*, 10 Abb. 392, and the cases digested in the note thereto. See *Davis v. Morris*, 21 Barb. 152.

c. In what cases. The court must determine when a proper case is presented for the exercise of its power, and may prescribe the terms upon which the permission should be accorded. *Mitchell v. Van Buren*, 27 N. Y. (13 Smith) 300.

ARTICLE VI.

THE JUDGMENT.

Section 1. How entered. The statement must be filed with the county clerk, or with the clerk of the superior court of the city of New York, who must indorse upon it and enter in the judgment book a judgment of the supreme or superior court for the amount confessed, with costs and disbursements. Code, § 384. The courts will not allow a party to suffer from the mistakes or omissions of its officers; and hence, if the clerk through inadvertence omits to indorse the judgment upon the statement, as required by section 384, the court will, upon proper application, direct such indorsement to be made *nunc pro tunc*. *Neele v. Berryhill*, 4 How. 16.

Where the confession omitted to authorize the entry of judgment in direct terms, it was held that the judgment could not be set aside for irregularity, as the provision for that is merely directory. *Park v. Church*, 5 How. 381; S. C., 1 Code R. N. S. 47.

Indorsement of judgment.

COURT.

John Smith, plaintiff,	}
<i>agst.</i>	
John Jones, defendant.	

On filing the within confession and statement made by the defendant John Jones, in pursuance of the Code of Procedure,

it is adjudged that the plaintiff John Smith, in whose favor such confession is made, recover against the said defendant John Jones dollars and cents and dollars and cents, costs and disbursements, amounting in all to \$.

M. W., Clerk.
Filed , 187 .

It is more common, however, when an amendment is ordered, to direct that it be made without prejudice to the rights of intervening judgment creditors and purchasers. *McKee v. Tyson*, 10 Abb. 392, and note thereto; *Johnston v. Fellerman*, 13 How. 21; *Davis v. Morris*, 21 Barb. 152.

Section 3. Judgment payable in installments. A judgment may be entered for a debt which is not all due or which is payable in installments (see art. 8 of this chap.); and although execution may be issued for the installments as they become due, yet the judgment may remain as security for the installments thereafter to become due. Code, § 384.

ARTICLE VII.

THE COSTS.

Section 1. Judgment to be entered with, by clerk. The clerk must, upon a proper filing of the statement, indorse upon it, and enter in the judgment book a judgment for the amount confessed, with \$5 costs, together with disbursements. Code, § 384.

The confession need not authorize the entry of judgment *with costs*, but it is the clerk's duty to enter the judgment with costs and disbursements.

ARTICLE VIII.

THE EXECUTION.

Section 1. May be enforced as in other cases. After the judgment is properly entered it becomes a judgment of the court, upon which executions may be issued and enforced in the same manner as upon judgments in other cases in the supreme and superior court. Code, § 384.

It is not a radical defect in the execution if it describes the judgment as having been obtained in an action. *Healy v. Preston*, 14 How. 20.

If the judgment is entered for a debt which is not all due, or which is payable in installments, execution may be issued for the collection of the installments which have become due. The execution in such case should be in the usual form, but must be indorsed by the attorney or person issuing it, with a direction to the sheriff to collect the amount due on the judgment, with interest and costs, which amount must be stated in the indorsement, with interest thereon and the costs of the judgment. Code, § 384.

When other installments are due, execution may be issued to collect them in like manner; that is, with an indorsement directing the sheriff to collect the amount due, with interest, which amount should be distinctly stated in such indorsement, with the interest, etc. Code, § 384.

ARTICLE IX.

REMEDIES OR RELIEF AGAINST.

Section 1. Who may be relieved. As has been before remarked, a judgment entered upon a defective statement of confession is good as between the parties to such judgment (see *ante*, 691, art. 6, § 2), but as to third persons whose rights have attached by a judgment, or by purchase of or lien on property affected by the confessed and defective judgments, the latter judgment is voidable and may be set aside or adjudged void by the court, so far as such third persons and their rights are concerned. *Hopkins v. Nelson*, 24 N. Y. (10 Smith) 518; *Miller v. Earle*, id. 110; *Dunham v. Waterman*, 17 N. Y. (3 Smith) 9; S. C., 6 Abb. 357.

It has been held distinctly that judgment creditors, grantees and mortgagees may attack such a judgment. *Norris v. Denton*, 30 Barb. 117; *Kendall v. Hodgins*, 7 Abb. 309; S. C., 1 Bosw. 659.

An assignee of the defendant in the judgment cannot question its validity. *Beekman v. Kirk*, 15 How. 228.

Nor can it be impeached collaterally. *Sheldon v. Stryker*, 34 Barb. 116; S. C., 21 How. 329.

And where property has been sold under an execution on such a judgment, only those having a lien on the property at the time of the levy can question the purchaser's title. *Miller v. Earle*, 24 N. Y. (10 Smith) 110.

Section 2. How to obtain relief.

a. By motion. Relief may be obtained by those entitled to relief against a defective judgment by motion made at special term for that purpose. *Chappel v. Chappel*, 12 N. Y. (2 Kern.) 215; *Dunham v. Waterman*, 17 N. Y. (3 Smith) 9; S. C., 6 Abb. 357; *Norris v. Denton*, 30 Barb. 117.

The motion papers are usually entitled in the same manner as the judgment sought to be set aside (see *Rae v. Lawser*, 18 How. 23; S. C., 9 Abb. 380 (*n*), and cases cited above), but sometimes the title of the judgment which seeks priority is also inserted as in *The Bank of Kinderhook v. Jenison*, 15 How. 41.

It is the better practice to specify in the moving papers the grounds of the motion, but it has been held that this is not nec-

When relief will not be granted — Confession by lunatic or married woman.

essary. See *Winnebrenner v. Edgerton*, 17 How. 363; S. C., 8 Abb. 419; 30 Barb. 185.

The motion should be made upon affidavits showing the facts. See *Von Beck v. Shuman*, 13 How. 472.

The motion may be opposed by affidavits (see *Mitchell v. Van Buren*, 27 N. Y. [13 Smith] 300), and the party asking for relief must make out his case by a preponderance of proof. *Williams v. Hernon*, 33 How. 241; S. C., 3 Keyes, 99.

b. When relief will not be granted. If the judgment which seeks priority was entered upon confession — the statement for which is as defective as that which it seeks to supersede — relief will not be granted. *Rae v. Lawser*, 18 How. 23; S. C., 9 Abb. 380(n).

c. By action. Proceeding by action is a proper method of testing the validity of a senior judgment. *Miller v. Earle*, 24 N. Y. (10 Smith) 110; *Dunham v. Waterman*, 17 N. Y. (3 Smith) 9; S. C., 6 Abb. 357; *Norris v. Denton*, 30 Barb. 117.

The plaintiff in the confessed judgment may, in a proper case, bring an action against the parties interested, to have his judgment reformed and declared a valid lien on the property against which it was docketed. *Union Bank v. Bush*, 36 N. Y. (9 Tiff.) 631; S. C., 3 Trans. App. 235; reversing S. C., *sub nom. Hammond v. Bush*, 8 Abb. 152.

d. Confession by lunatic. The committee of a lunatic may bring an action to set aside a judgment entered upon confession of the lunatic. *Person v. Warren*, 14 Barb. 488.

e. Confession by married woman. Where a married woman applied, on motion, for an order setting aside a judgment confessed by her previous to the act of 1860, the court denied the motion, but without prejudice to an action by the plaintiff to reform his judgment, or by the defendant for relief against it. *Knickerbacker v. Smith*, 16 Abb. 241. (See *ante*, 684, art. 3, § 2.)

CHAPTER VII.

JUDGMENT ON DISCONTINUANCE.

ARTICLE I.

IN GENERAL.

• The proceedings on discontinuance have already been fully discussed under the head of "Terminating actions without trial." See Vol. 2, p. 600. For form of judgment of discontinuance, see *id.* 516.

CHAPTER VIII.

JUDGMENT ON INTERLOCUTORY DECREE.

ARTICLE I.

ENTRY OF JUDGMENT UPON DECREE, ETC.

Section 1. Judgment, how rendered. The various proceedings necessary to be taken upon the execution of interlocutory or decretal orders, prior to the final entry of judgment, have been made the subject of a separate chapter (see *ante*, p. 338), and, in the present chapter, it is only necessary to treat of the judgment to be entered, and the mode of entry thereof.

It should be remembered that no final judgment can be pronounced until the execution of the last order reserving further directions. See *ante*, 338, 389 to 393 ; see, also, 2 Dan. Ch. Pr. (4th Am. ed.) 1966. Upon the final hearing of the cause on further directions, final judgment may be rendered by the court in either of two ways. First, by the allowance of the judgment in the form previously prepared and submitted on such hearing by the moving party ; second, by granting an order which specifies the substance or material points of the judgment, and directing such judgment to be settled in the usual way previous to its entry. The latter of these methods is usually adopted in all cases of judgment rendered upon further directions after an interlocutory reference, for the reason that a judgment of this kind almost invariably contains special provisions and directions which make a previous settlement proper and necessary. See 1 Van Santv. Eq. Pr. 611.

Section 2. Entry, when judgment allowed on the hearing. In case the judgment is previously prepared by the moving party and is allowed on the hearing, it is only necessary that it be filed with the clerk and signed by him. The costs when taxed should be inserted therein and the judgment annexed to the judgment roll. This is the rule where the judgment is to be entered in the same county in which it is allowed ; but if allowed in a county other than where the roll is to be filed, the clerk will certify it to such county by indorsing his certificate thereon. The subsequent

Entry, when judgment not settled on the hearing.

proceedings are identical with those in cases of judgment certified to another county on default of an answer.

Section 3. Entry, when judgment not settled on the hearing. Where the judgment is not settled on the hearing, but its form and terms remain to be settled, the order directing judgment must be drawn, and either assented to by the adverse party, or settled, entered and served. The judgment, drawn in pursuance of such order, must be settled in the mode to be observed in settling an order, as to which, see *ante*, 389 to 393. After being so settled, the judgment may be entered as in other cases.

Section 4. Form and contents of judgment roll. The judgment roll is made up of the written decision of the court, the order of reference thereon, the report of the referee and accompanying documents, the order for judgment, and the judgment itself. 1 Van Santv. Eq. Pr. 612. So where exceptions have been taken to the report of the referee, and such exceptions have been brought to argument and passed upon on the final hearing, and have in any respect affected or modified the referee's report, in such case, they should properly form part of the judgment roll. 1 Van Santv. Eq. Pr. 612. Mere formal proceedings, such as proof of the service of notice of filing report, or exceptions, or of notice of final hearing, which go to the regularity only, and not to the substance of the judgment, need not be included in the judgment roll.

Section 5. Costs. Costs cannot be entered in a judgment in an equity suit, unless specially adjudged by the court; but if so entered without a decision or order of the court granting an allowance of them, it is merely an irregularity which may be corrected by motion to set aside the judgment, or, if preferred, to strike out the allowance of costs. This will not, however, affect the judgment itself, either on appeal or in respect to any proceedings to enforce it, or upon any question arising in regard to its validity. See 1 Van Santv. Eq. Pr. 612, 613.

ARTICLE II.

RECTIFYING, AMENDING AND VACATING, ETC.

Section 1. Decree or judgment, how amended before entry or enrollment. Under the former practice in chancery, clerical mistakes in decrees or orders, or errors arising from any accidental

Decree or judgment how amended before entry or enrollment.

slip or omission, might at any time before enrollment be corrected, upon motion or petition, without the form and expense of a rehearing. *Lawrence v. Cornell*, 4 Johns. Ch. 546; *Clark v. Hall*, 7 Paige, 382; *Rogers v. Rogers*, 1 id. 188; *Wallis v. Thomas*, 7 Ves. 292; *Turner v. Hodgson*, 9 Beav. 265; *Thompson v. Goulding*, 5 Allen, 81; *Loyd v. Hicks*, 31 Ga. 140. Thus, a decree was amended where, through inadvertence, costs had been given by it to a party in the case where he was not entitled to them. *Murray v. Blatchford*, 2 Wend. 221. And not only might a decree be amended or corrected, on motion or petition as to mere clerical errors, but by the insertion of any provision or direction, which would have been inserted as a matter of course, if the same had been asked for at the hearing, as a necessary or proper clause to carry into effect the decision of the court. *Clark v. Hall*, 7 Paige, 382. See *Jenkins v. Eldredge*, 1 Wood & M. 61.

In all cases where the alteration sought was merely consequential upon the decree itself, or the addition of some direction which had been omitted, the omission was supplied by a distinct order, without altering or interlining the decree itself. *Clark v. Hall*, 7 Paige, 382; *Lane v. Hobbs*, 12 Ves. 458. But where the alteration could not be made by supplemental order, as in cases of error in the direction of the decree, the court ordered the register to attend with the book itself, and made the alteration in open court. *Tomlins v. Palk*, 1 Rus. 476; 1 Barb. Ch. Pr. 352; 1 Van Santv. Eq. Pr. 613. So, in a case decided under the Code, this practice is approved, and it is said that a judgment record should not be amended by an obliteration or erasure, even when it leaves the passage legible. *Sluyter v. Smith*, 2 Bosw. 673. The proper mode is by entering an order of amendment, in the proper order book kept by the clerk, and appending a copy thereof to the judgment record. It is also proper to mark the passages struck out by the amendment by brackets or lines of distinction, and to refer by entry in the margin of the judgment to the order of amendment, by its date; or the judgment, as amended, may be entered anew, if the party so desire.

Although this is the proper practice, yet it was also held that amending by an erasure was not ground for vacating the amended judgment. *Ib.* See *Laverty v. Moore*, 33 N. Y. (6 Tiff.) 658.

Section 2. How amended after entry or enrollment. After the enrollment of the decree, the general rule was that, if it had been regularly obtained, it could not be altered in other respects than mere form, or on account of surprise, except by bill of review. *Bennett v. Winter*, 2 Johns. Ch. 205; *Wiser v. Blachley*, id. 488; *Ray v. Connor*, 3 Edw. Ch. 478. But in some cases the court extended the indulgence of rectifying decrees in which there had been clerical mistakes, to decrees which had been actually enrolled. Thus, in cases of miscasting, where the matter was apparent upon the face of the decree itself to have been erroneous, it was permitted to be explained and rectified by order; so, if some part of the decree was omitted in the enrollment, it was allowed to be inserted, upon motion to the court. See *Beekman v. Peck*, 3 Johns. Ch. 415; *Clark v. Hall*, 7 Paige, 382; *Thompson v. Goulding*, 5 Allen, 81.

And, under the Code, it has in like manner been permitted to amend a judgment after entry and enrollment, by correcting a mistake, on motion merely, and without a rehearing. Thus where, in a judgment of sale, the sale was directed to be advertised three weeks, instead of six as required by law, but in fact the advertisement was published six weeks, it was held, even after the sale, that the error might then be corrected on motion, and the purchaser be compelled to take title. *Alvord v. Beach*, 5 Abb. 451. See *Gaskin v. Anderson*, 55 Barb. 259; S. C., 7 Abb. N. S. 1; S. C. affirmed, 8 id. 312.

A judgment, after being enrolled, may, on motion, be amended and rectified by filing and attaching to the judgment roll any papers, necessary to the judgment, which the party making up the judgment roll may have omitted to file. *Waring v. Waring*, 7 Abb. 472. And it has been held that, even after a sale in a partition suit, the court will allow a judgment roll to be so amended by filing, *nunc pro tunc*, a bond of a guardian *ad litem* for an infant defendant. *Croghan v. Livingston*, 25 Barb. 336; S. C. affirmed, 6 Abb. 350; 17 N. Y. (3 Smith) 218. See *McMurray v. McMurray*, 41 How. 41; 60 Barb. 117; 9 Abb. N. S. 315. The omission to file such a bond is an irregularity merely, which does not affect the validity of the judgment or discharge the purchaser from completing the contract. *Croghan v. Livingston*, 25 Barb. 336. He may not, however, be compelled to complete his contract, or take title, until the amendment is made. *Waring v. Waring*, 7 Abb. 472.

By bill of review.

A judgment roll may also be amended by inserting an order, *nunc pro tunc*, withdrawing one of several causes of action that has been abandoned on the trial. *Fry v. Bennett*, 3 Bosw. 200; S. C., 9 Abb. 45; S. C. affirmed, 28 N. Y. (1 Tiff.) 324. But such amendments and all similar ones made after judgment, are permitted only for the purpose of sustaining the judgment. *Englis v. Furniss*, 3 Abb. 82; *Gasper v. Adams*, 24 Barb. 287; *Williams v. Birch*, 6 Bosw. 674.

The Code provides that "the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Code, § 173.

The power of amendment thus conferred by the above provisions extends to a judgment as well as to pleadings and process, and is said to be sufficiently comprehensive to include almost all cases which can arise and call for the interposition of the court. *Sherman v. Fream*, 8 Abb. 33. See *Smith v. Coe*, 7 Rob. 477.

Application to correct a general term judgment as to any mere matter of form, or as to any proper amendment embraced within the above provisions of the Code, may be made at special term. *De Agreda v. Mantel*, 1 Abb. 130; *Ayres v. Covill*, 9 How. 573; *Corning v. Powers*, id. 54. But a judgment of the general term cannot be altered or set aside by the special term upon any matter connected with the merits. *Ib.*; *Englis v. Furniss*, 3 Abb. 82.

Section 3. By bill of review. When the correction of an enrolled decree under the former practice in chancery was desired, in other respects than those of mere form, mistake or surprise, the proper way to proceed was by bill of review. See 2 Dan. Ch. Pr. (4th Am. ed.) 1575; *Bennett v. Winter*, 2 Johns. Ch. 205; *Wiser v. Blachly*, id. 488. A bill of this character could only be brought upon error in law appearing on the face of the decree without further examination of matters of fact, or upon some new matter which had been discovered after the decree, and could not possibly have been used when the decree was made. See *Perry v. Phelps*, 17 Ves. 178; *Wiser v. Blachly*, 2 Johns. Ch.

Vacating judgment.

488; *Edmondson v. Moseby*, 4 J. J. Marsh. 500; *Brewer v. Bowman*, 3 id. 492. The practice of correcting an enrolled judgment, in like cases under the Code, is presumed to be similar to the former practice by bill of review, for the details of which reference is made to books on chancery practice. See 1 Van Santv. Eq. Pr. 616.

A proceeding of this kind will not be sustained merely upon the ground that the court has decided wrong upon a question of fact. *Webb v. Pell*, 3 Paige, 368; *Getzler v. Saroni*, 18 Ill. 511; *Eaton v. Dickinson*, 3 Sneed (Tenn.), 397; *Love v. Blewit*, 1 Dev. & Bat. Eq. 108; *Dougherty v. Morgan*, 6 Monr. 153. And if brought to present new matters discovered since the judgment, the new matter must be relevant and material, and such as might probably have occasioned a different determination. *Wiser v. Blachly*, 2 Johns. Ch. 488; *Livingston v. Hubbs*, 3 id. 124; *Pendleton v. Fay*, 2 Paige, 204; *Patridge v. Usborne*, 5 Russ. 195; *Young v. Keighly*, 16 Ves. 348; *Wilson v. Webb*, 2 Cox, 3. See 2 Dan. Ch. Pr. 1577.

Section 4. Vacating judgment. Another method by which an amendment or correction of an enrolled judgment may be obtained, is by motion to set the judgment aside, so as to enable a party to make a defense upon the merits, in a case where he has been deprived of such defense either by mistake or accident, or through the negligence of his attorney. This was allowed under the former practice in equity. *Tripp v. Vincent*, 8 Paige, 176. And where the rights of third parties were not thereby prejudiced, a decree would be opened though it had been partly executed, as by a sale under the decree, where the complainant had purchased, but had not parted with his interest to a *bona fide* purchaser or mortgagee. *Millspaugh v. McBride*, 7 Paige, 509.

Under our present practice, ample power in this respect is conferred by the provisions of the Code, which authorizes the court to relieve a party from a judgment taken against him "through his mistake, inadvertence, surprise, or excusable neglect," at any time within one year after notice of the judgment. Code, § 174. And it has been held, that a party who has a judgment in his favor may, on application to the court, under this section of the Code, have redress or be relieved, the same as though judgment was against him. *Montgomery v. Ellis*, 6 How. 326. But, in such case, sufficient excuse or cause must

Vacating judgment.

be shown by him to satisfy the court that the judgment ought to be opened. *Mann v. Provost*, 3 Abb. 446.

Irregularity in the entry of a judgment may always be properly urged as a good ground for setting it aside; and a judgment of the general term may even be set aside at special term on this ground, by motion (*Englis v. Furniss*, 3 Abb. 82); but where a party is desirous of relief against a judgment which can be fully obtained by means of an amendment thereof, he should make application for such amendment only, and a motion to vacate the judgment in such case will, or at least may, very properly be denied. *Sherman v. Fream*, 8 Abb. 33.

CHAPTER IX.

ENTRY AND NOTICE OF JUDGMENT.

ARTICLE I.

IN GENERAL.

Section 1. What may be entered or enrolled. All ordinary judgments in civil actions are required to be entered in the judgment book to be kept by the clerk. See Code, §§ 278, 279, 280. Also "any order or judgment directing the payment of money, or affecting the title of property, if founded on petition, where no complaint is filed, may, at the request of any party interested, be enrolled and docketed as other judgments." Sup. Ct. Rule 35.

It should be remembered that the entry is not essential to the existence and force of the judgment rendered. The rendition of a judgment is a judicial act, but its entry upon the record is merely ministerial (*Fish v. Emerson*, 44 N. Y. [5 Hand] 376; *Matthews v. Houghton*, 11 Me. 377; *Stephens v. Santee*, 49 N. Y. [4 Sick.] 35; *Allen v. Godfrey*, 44 N. Y. [5 Hand] 493), and in no case is that which the court performs judicially to be avoided by the action or want of action of the judges or other officers of the court in their ministerial capacity. *Ib.* See *Freem. on Judg.* 21.

Section 2. By whom entered. It is the right, and is also made the duty of the party who succeeds on the main issue to enter judgment. Thus where a plaintiff succeeds in an action, but the sum recovered is too small to entitle him to costs, but the defendant is entitled to costs instead, it is nevertheless the duty of the plaintiff to enter judgment. *Fobes v. Meigs*, 3 Wend. 308. See *Johnson v. Sagar*, 10 How. 552.

In case the party whose duty it is to enter judgment neglects or refuses to do so, the opposite party may compel him, by motion, to do it (*Purdy v. Peters*, 23 How. 328; S. C., 15 Abb. 160; *Anonymous*, 1 How. 200. See *Bank of Geneva v. Hotchkiss*, 5 How. 478; S. C., 1 Code R. N. S. 153; *Lentilhon v. City of New York*, *id.* 111; S. C., 3 Sandf. 721; *Canfield v. Gaylord*, 12 Wend. 236), or he may do it himself, on obtaining leave, which leave is granted by the court, as a matter of course. *Runnell v.*

When to be entered — *Entry nunc pro tunc*.

Griffin, 8 Abb. 39. See *Hoyt v. Blain*, 12 Wend. 188; *Albany and West Stockbridge R. R. v. Cady*, 6 Hill, 265. If, in such case, the defendant should enter judgment without leave obtained, it will not be sufficient ground for setting the judgment aside (*Runnell v. Griffin*, 8 Abb. 39); but ordinarily he should be charged with costs of the motion, as a condition of allowing it to stand. See *Frisbie v. Riley*, 12 Wend. 249.

Section 3. When to be entered. The party prevailing in an action has a clear right to have his judgment entered up, and the roll filed immediately on the final decision being made, unless his proceedings are stayed by an order of the court. *Lynde v. Cowenhoven*, 4 How. 327; S. C., 3 Code R. 7; *Droz v. Lakey*, 2 Sandf. 681; S. C., 2 Code R. 83. But no judgment can be entered against a party until all the issues raised by him have been decided. Thus, a party cannot perfect judgment on an issue of law, while there are issues of fact undisposed of in the cause (*Sutherland v. Tyler*, 11 How. 251; *Belknap v. McIntyre*, 2 Abb. 366); and a judgment entered in such case is irregular, and will be set aside on motion. *Masters v. Barnard*, 1 Code R. N. S. 407; S. C., 6 How. 113. So, if a reference is ordered on a trial, to take an accounting, judgment cannot be entered until the accounting has been had, and every thing essential to the judgment has been ascertained. *McMahon v. Allen*, 7 Abb. 1; *Lawrence v. Farmers' Loan and Trust Co.*, 15 How. 57; S. C., 6 Duer, 689. See *People v. Albany & Susquehanna Railroad Co.*, 5 Lans. 25, 35; *Smith v. Lewis*, 1 Daly, 452.

Section 4. Entry nunc pro tunc. The entry of a judgment or decree, *nunc pro tunc*, seems to have been permitted by courts of law and of equity from the earliest period (See *Shephard v. Brenton*, 20 Iowa, 41; *Mays v. Hassell*, 4 Stew. & Port. 222; *Mayor of Norwich v. Berry*, 4 Burr. 2277; *Hodges v. Templer*, 6 Mod. 191; *Evans v. Rees*, 12 Ad. & El. 167); and the time within which the order might be obtained was never limited. Thus, in one case, where the original decree had been lost, the court permitted it to be entered *nunc pro tunc* from the office copy, after a lapse of twenty-three years. *Jesson v. Brewer*, 1 Dick. 370. So, in later times, there are numerous instances of an entry of judgment, *nunc pro tunc*, after a long interval. See *Seaman v. Drake*, 1 Caines, 9; *Chichester v. Cande*, 3 Cow. 39, and note; *Lawrence v. Richmond*, 1 Jac. & W. 241; *Donne v. Lewis*, 11 Ves. 601.

Entry nunc pro tunc.

The entry of judgment, *nunc pro tunc*, is intended to be in furtherance of justice, and it will not be ordered where the rights of third parties acquired in the mean time would be thereby injuriously affected. See cases above cited; see, also, *McCormack v. Wheeler*, 36 Ill. 114; *Graham v. Lynn*, 4 B. Monr. 18. For, although the public are bound to take notice of the regular records, they are not obliged to know of the existence and understand the meaning of memoranda made by the judge, and upon which the record may, afterward, happen to be perfected. *Ib.*; *Jordan v. Petty*, 5 Fla. 326.

When a party to an action dies after the trial, and before judgment, the court will order the entry of judgment *nunc pro tunc* as of the time of trial. *Campbell v. Mesier*, 4 Johns. Ch. 334; *Wood v. Keyes*, 6 Paige, 478; *Donne v. Lewis*, 11 Ves. 601; *Ehle v. Moyer*, 8 How. 244. See *Kissam v. Hamilton*, 20 How. 369. A judgment will not be entered *nunc pro tunc* as of a date prior to the actual judgment, merely to enable a party to effect the amount of his costs. *Moore v. Westervelt*, 14 How. 279.

Section 5. Upon whose direction. The Code requires that "judgment upon an issue of law or of fact, or upon confession, or upon failure to answer (except where the clerk is authorized to enter the same by the first subdivision of section 246, and by section 384, and except where it may be given at the general term as provided in section 265) shall, in the first instance, be entered upon the direction of a single judge or report of referees." Code, § 278.

A judgment upon a written offer of the defendant (section 385), although within the terms, is not within the spirit of the above section of the Code (278), and may be entered without the direction of a judge of the court. *Hill v. Northrop*, 9 How. 525.

The only case in which a judge at *chambers* can grant a judgment is under section 247 of the Code, where judgment may be given on a frivolous demurrer, answer or reply. In all other cases judgment can be rendered only by the court when sitting as such. *Aymar v. Chase*, 1 Code R. N. S. 330; S. C., 12 Barb. 301. The report of a referee being, in fact, equivalent to the decision of a judge, is, of itself, sufficient authority to the clerk to enter up judgment accordingly, without any special direction by the court. *Hancock v. Hancock*, 22 N. Y. (8 Smith) 568; Code, § 272.

In actions for special relief — Judgments on verdict.

Section 6. In actions for special relief. Where a judgment is ordered in any action in which special relief is granted, a draft of the judgment, in conformity with the decision, should be prepared by the successful party, and a copy thereof served by him upon his opponent, with a notice of the time and place of settlement. Ordinarily, two days' notice is considered sufficient.

If the defendant has appeared in the action, so as to be entitled to notice of the proceedings, the plaintiff cannot settle *ex parte* the form of the judgment to be entered, where it grants him special relief. The defendant is entitled to notice of the application to settle the judgment, and, if entered without such settlement, or without consent, it will be set aside on motion. *Wood v. Lambert*, 1 Code R. N. S. 214 ; S. C., 3 Sandf. 724.

ARTICLE II.

JUDGMENT ON VERDICT.

Section 1. Entry of verdict. The Code requires that "upon receiving a verdict the clerk shall make an entry in his minutes specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon or an order that the cause be reserved for argument or further consideration." Code, § 264.

Section 2. Entry of judgment by clerk. Unless a different direction be given by the court, it is made the duty of the clerk to enter a judgment in conformity with the verdict entered by him in his minutes. *Ib.*; *Morrison v. N. Y. & New Haven R. R. Co.*, 32 Barb. 568. If he has made an erroneous entry in his minutes, he may amend them so as to correct the error, and conform the entry to the decision made by the court. *Smith v. Coe*, 7 Rob. 477.

There are but two cases in which a cause tried before a jury can be taken to the general term before judgment and judgment there given. First, where exceptions are ordered to be heard by the general term in the first instance. Second, where there is an uncontroverted state of facts, and the case presents only questions of law, and the judge directs a verdict subject to the opinion of the court. *Matter of Welch*, 14 Barb. 396 ; 7 How. 173 ; *Cobb v. Cornish*, 16 N. Y. (2 Smith) 602 ; S. C., 15 How. 407 ; 6 Abb. 129. In all other cases judgment must be entered in conformity to the

Judgment on trial of fact by court.

verdict at the circuit, on the direction of a single judge, agreeably to the provisions of the Code, section 264. See *Taylor v. Harlow*, 11 How. 285.

On a verdict directed to be taken subject to the opinion of the court at general term, the judgment may be rendered for a dismissal of the complaint where the case might have been thus disposed of in the first instance. Such was formerly the practice, and it has not been changed by the Code. See *Crittenden v. Empire Stone Dressing Co.*, 3 Abb. 71; S. C., 6 Duer, 30.

ARTICLE III.

JUDGMENT ON TRIAL OF FACT BY COURT.

Section 1. Decision, when filed. Upon the trial of a question of fact by the court its decision is required to be given in writing, and it must be filed with the clerk within twenty days after the court at which the trial took place. Code, § 267. This decision constitutes the sole proper authority for entering up judgment.

Section 2. Effect of not filing decision. A judgment upon a trial by the court cannot be regularly entered unless the decision of the court has been filed as prescribed by the Code, section 267. See *Burger v. Baker*, 4 Abb. 11; *Thomas v. Tanner*, 14 How. 426. If, however, judgment should be entered without the decision of the court being thus filed, the judgment is not void (*Lewis v. Jones*, 13 Abb. 427. See *Sands v. Church*, 6 N.Y. [2 Seld.] 347), but is merely irregular, which is sufficient ground for supporting a motion to set it aside (*Thomas v. Tanner*, 14 How. 426; *Burger v. Baker*, 4 Abb. 11), but not for an appeal. *Hulce v. Sherman*, 13 How. 411.

On a motion to set aside a judgment for irregularity in this respect, it must clearly appear on the moving papers that no decision has in fact been filed (*Lewis v. Jones*, 13 Abb. 427), and it is held that where there is no pretense of merits, or that the action was not correctly decided, the omission to file the decision in writing may be disregarded under section 176 of the Code. *Ib.*

If, upon motion by either party to a general or special term of the court, it shall be made to appear that the decision is unreasonably delayed, the court may make an order absolute for a new trial, or may order a new trial unless the decision shall be filed by a time to be specified in the order. Code, § 267.

Requisites of decision—Correcting decision—Judgment, when entered.

Section 3. Requisites of decision. The Code requires the decision to be given in writing, and that it contain a statement of the facts found, and the conclusions of law separately; and it must also be signed by the judge, otherwise the judgment will be irregular. See Code, § 267; *Peck v. Yorks*, 14 How. 416; *Thomas v. Tanner*, id. 426; *Deming v. Post*, 1 Code R. 121; *Hulce v. Sherman*, 13 How. 411.

Section 4. Correcting decision. The proper remedy, in case a party feels aggrieved at the finding of the judge, is by motion to have the finding corrected; and if a party omits this remedy, even in a proper case, it cannot be considered on an appeal from the judgment. *Martin v. Albright*, 23 How. 306; S. C., 14 Abb. 305; *Sharp v. Wright*, 35 Barb. 236; *Niles v. Price*, 23 How. 473. See *Casler v. Shipman*, 35 N. Y. (8 Tiff.) 533; *Bunten v. Orient Ins. Co.*, 2 Keyes, 667; affirming S. C., 8 Bosw. 448.

Section 5. Judgment, when entered. Prior to the amendment of section 267 of the Code in 1870, it was settled to be the duty of the clerk, unless otherwise directed by the court, to enter judgment at once on the filing of the decision, and the successful party might cause it to be done. See *Lynde v. Cowenhoven*, 3 Code R. 7; S. C., 4 How. 327; *Cotes v. Smith*, 29 id. 326; S. C. affirmed, 31 id. 146, 638(n). It was also settled that the omission of the clerk to enter the judgment would not be allowed to prejudice the party. *Butler v. Lee*, 33 How. 251; S. C., 3 Keyes, 70.

The amendment to the Code of the above-named year provides, and the practice now is, that, in cases of trial by the court, judgment upon the decision shall be entered accordingly, four days after the decision is filed with the clerk. Code, § 267. See *People v. Albany and Susquehanna R. R. Co.*, 57 Barb. 204, 209(n).

Section 6. Judgment must conform to decision. As the decision of the judge upon the trial of a question of fact by the court is the only authority for entering judgment, the judgment must, in all respects, conform to the decision, and must contain no provisions not embraced therein. *Loeschigk v. Addison*, 19 Abb. 169; S. C., 3 Rob. 331. See *ante*, 220, where this subject is more fully discussed under the head of "Trial of issues of fact by the court."

ARTICLE IV.

JUDGMENT ON TRIAL OF AN ISSUE OF LAW BY THE COURT.

Section 1. Authority for entering. As upon the trial of an issue of fact by the court, so the only authority for the entry of judgment on the trial of an issue of law is the decision of the judge who tried the issue. Code, § 267. And any thing in the judgment not in the decision is improper and erroneous. See *Chamberlain v. Dempsey*, 9 Bosw. 212; S. C., 14 Abb. 241; *Loeschigk v. Addison*, 3 Rob. 331; S. C., 4 Abb. N. S. 210; 19 Abb. 169.

Section 2. When entered. Judgment upon the decision is required to be entered accordingly four days after the filing of the decision. Code, § 267. See *ante*, 236, "Trial of issue of law by the court."

Section 3. How entered. The entry of the judgment must be made by the clerk as in all other cases. See *Schenectady and Saratoga Plank Road Co. v. Thatcher*, 6 How. 226; S. C., 1 Code R. N. S. 380; *Lentilhon v. Mayor, etc., of New York*, id. 111; S. C., 3 Sandf. 721. The clerk may correct his own error, and conform his entry to the decision which has been made by the court. *Smith v. Coe*, 7 Rob. 477.

Where judgment is ordered for the plaintiff, on a frivolous answer or demurrer, he takes judgment in the same manner as if no answer or demurrer had been put in, provided there is no other issue. *Aymar v. Chase*, 1 Code R. N. S. 141; *Saltrus v. Kipp*, 2 Abb. 382; S. C., 5 Duer, 646; 12 How. 342; *King v. Stafford*, 5 id. 30.

ARTICLE V.

JUDGMENT ON TRIAL BY REFEREE.

Section 1. Authority for entering. When the whole issue is tried by a referee, the same effect is given to his decision, under the provisions of the Code, as to that of a single judge, and judgment is entered upon it accordingly, without any special direction by the court. Code, §§ 272, 278. See *Hancock v. Hancock*, 22 N. Y. (8 Smith) 568; *Bihin v. Bihin*, 17 Abb. 19, 27; *Renouil v. Harris*, 1 Code R. 125; S. C., 2 id. 71; 2 Sandf. 641;

When, and how entered — Compelling entry.

Griffing v. Slate, 3 Code R. 213 ; S. C., 5 How. 205 ; *McMahon v. Allen*, 7 Abb. 1 ; 27 Barb. 335. The report of the referee in such case does not require the confirmation of the court (Ib.), as is sometimes necessary on a reference upon failure to answer, before judgment can be entered. *Cram v. Bradford*, 4 Abb. 193.

Section 2. When entered. As the rules regulating the entry of judgment, on the decision of a judge, are equally applicable to judgment on the report of a referee (Code, § 272), the entry in the latter case, as in the former, must be made accordingly four days after the filing of the report or decision of the referee. See Code, § 267 ; 8 Abb. N. S. 122, note.

Where the referee's report is in favor of the plaintiff, and it states that an accounting must be had before final judgment can be rendered, an order will be entered referring the case back to the referee, to take and state the account, and until such accounting has been had, no judgment can be entered. *Lawrence v. Farmers' Loan and Trust Co.*, 15 How. 57 ; S. C., 6 Duer, 689 ; *McMahon v. Allen*, 27 Barb. 335 ; S. C., 7 Abb. 1.

Section 3. How entered. Judgment upon the report of a referee is entered in the same manner as judgment upon the decision of a judge, which is by the clerk ; the entry of judgment being merely clerical. *Currie v. Cowles*, 7 Rob. 4 ; *McMahon v. Allen*, 7 Abb. 1 ; S. C., 27 Barb. 335 ; *Griffing v. Slate*, 5 How. 205. See *Coope v. Bowles*, 28 How. 10 ; S. C., 18 Abb. 442 ; 42 Barb. 87.

Section 4. Compelling entry. In a case where the successful party neglects or refuses to enter judgment, the opposite party should first request him to do so. If he still refuses, the aggrieved party should move that an order be made directing him to file the report, and enter up judgment upon it. In case the successful party still refuses, his opponent may then have a copy of the report, which he may file, and upon which judgment may be entered. *Richmond v. Hamilton*, 9 Abb. 71 (n). See, also, *Richards v. Allen*, 11 N. Y. Leg. Obs. 159.

ARTICLE VI.

JUDGMENT ON ORDER FOR LEGAL RELIEF.

Section 1. Judgment on admitted demand. The Code provides that when the answer of the defendant expressly, or by not deny-

Judgment on frivolous demurrer—On sham pleadings.

ing, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy. Code, § 244.

The cases in which such order may be made and enforced as a judgment have already been fully noticed, and need only be referred to in this place. See vol. 2, p. 590. For form of order see *id.* p. 594.

Section 2. On frivolous demurrer. The Code provides that if a demurrer be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of the court, for judgment thereon, and judgment may be given accordingly. Code, § 247. For full proceedings on the application for judgment in such case see, *ante* page 612, and for form of judgment see *ante*, page 637. See, also, vol. 2, p. 496.

Section 3. On sham pleadings. See vol. 2, p. 492. Sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may in their discretion impose. Code, § 152. When an answer has been stricken out as sham and irrelevant, the proper method of obtaining judgment is to proceed as if no answer had been put in. *Aymar v. Chase*, 1 Code R. N. S. 141; *DeForest v. Baker*, 1 Rob. 700; S. C., 1 Abb. N. S. 34. If the summons be for relief, the defendant is entitled to the usual eight days' notice of application for judgment after the answer has been stricken out. *Ib.*; Code, § 246, subd. 2.

The motion to strike out an answer as sham and insufficient may be made at any time before trial, even though the plaintiff has obtained an order for time to reply. *Miln v. Vose*, 4 Sandf. 660. See *ante*, 613.

Form of notice of motion.

(*Title of cause.*)

Please take notice, that on the affidavit herewith served, and on the pleadings in this action, the undersigned will move the court, at a special term to be held at _____, on the _____ day of _____, 18____, at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, to strike out the answer herein as sham, or for such other relief as may be just (with costs).

(*Date.*)

(*Address.*)

(*Signature.*)

Judgment book — Entry, when made.

Order thereon.

(*Title of cause.*)

(*At a special term, etc.*)

On reading and filing (*describe motion papers*), and on motion of E. B. for the plaintiff, and after hearing D. M. in opposition thereto (*or*, and on proof of due service of notice of the motion, and no one appearing in opposition thereto):

ORDERED: That the answer of the defendant G. S., in this action be stricken out as sham, with dollars costs to plaintiff.

A motion to strike out one of several defenses as sham may be united with an application for judgment on account of the frivolousness of the other defenses, under section 247 of the Code (*The People v. McCumber*, 18 N. Y. [4 Smith] 315); but if the answer is frivolous, the order should not be that it be struck out, but that it be overruled and plaintiff have judgment. *Ib.*; *Briggs v. Bergen*, 23 N. Y. (9 Smith) 162. See *Fettretch v. McKay*, 11 Abb. N. S. 453; S. C., 47 N. Y. (2 Sick.) 427; *Thompson v. The Erie R. R. Co.*, 45 N. Y. (6 Hand) 468; *Farmers' National Bank of Fort Edward v. Leland*, 50 N. Y. (5 Sick.) 673.

ARTICLE VII.

JUDGMENT BOOK.

Section 1. Entry of judgment in. The Code requires the clerk to keep, among the records of the court, a book for the entry of judgments, to be called the "judgment book" (Code, § 279), in which he must enter all judgments. Code, § 280. This requirement ought, in no case, to be dispensed with or disregarded, and it is equally applicable where the decision of the judge is made in writing and filed as in any other case. *Sherman v. Postley*, 45 Barb. 348; *Loeschigk v. Addison*, 3 Rob. 331; S. C., 19 Abb. 169; *Schenectady & Saratoga Plank Road Co. v. Thatcher*, 6 How. 226; S. C., 1 Code R. N. S. 380. And so in a controversy submitted without action. Code, § 373. Strictly speaking, there is no judgment until the entry thereof by the clerk in the judgment book. Code, § 373; *Blydenburgh v. Northrop*, 13 How. 289; *Lynch v. Rome Gas Light Co.*, 42 Barb. 591. See *Mehl v. Vonderwulbeke*, 46 N. Y. (1 Sick.) 539.

Section 2. Entry, when made. A strict compliance with the provisions of the Code would seem to make it the duty of the clerk to enter judgment at once, when judgment is actually pro-

Effect of omission to enter.

nounced, unless otherwise ordered by the court. *Stimson v. Higgins*, 9 How. 86; S. C., 16 Barb. 658. The provisions on the subject are, however, merely directory, and a substantial compliance with them is all that is absolutely necessary. See *Appleby v. Barry*, 2 Rob. 689; *Sears v. Burnham*, 17 N. Y. (3 Smith) 445; affirming S. C., 2 Bradf. 394. In practice the entry is usually made by the clerk on completion of the adjustment and ascertainment of the precise amount recovered, and sometimes even afterward from the judgment roll as filed. See 2 Whit. Pr. 502. See *ante*, 789, as to the time of entering judgment, after four days, etc.

Judgments must be entered or docketed by the clerks within legal hours, and at no other time. Sup. Ct. Rule 12. In the county of New York these hours are from 9 A. M. to 4 P. M. In the other counties from 8 A. M. to 6 P. M., between the 31st of March and the 1st of October; and for the other six months from 9 A. M. to 5 P. M., Sundays and holidays excepted. Laws of 1860, ch. 276.

The lien of a judgment takes place from the time when the entry is actually made. *Blydenburgh v. Northrop*, 13 How. 289. See *France v. Hamilton*, 26 How. 180; *Wardell v. Mason*, 10 Wend. 573; *Lemon v. Staats*, 1 Cow. 592.

Section 3. Effect of omission to enter. Where a substantial right is involved, the court will not allow a party to suffer through the omissions or mistakes of an officer of the court. *Seaman v. Drake*, 1 Caines, 9; *Close v. Gillespey*, 3 Johns. 526; *Chichester v. Cande*, 3 Cow. 39; *Renouil v. Harris*, 1 Code R. 125; S. C., 2 Sandf. 641. And as it is clearly the duty of the clerk and not of the party to enter judgment, the court will order it to be done *nunc pro tunc* at any time. *Neele v. Berryhill*, 4 How. 16.

The omission of the clerk to sign the judgment does not affect its validity; and the court may also direct it to be done *nunc pro tunc*, and will sustain all intermediate proceedings on the judgment. *Artisans' Bank v. Treadwell*, 34 Barb. 553; S. C. affirmed, 25 N. Y. (11 Smith) 489, *sub nom.* *Van Alstyne v. Cook*; *Seaman v. Drake*, 1 Caines, 9. See *Manning v. Guyon*, 1 Code R. 43. So it is clearly held that the delay of the clerk to enter a final decree in the judgment book does not affect its validity. *Butler v. Lee*, 3 Keyes, 70; S. C., 33 How. 251; *Lynch v. Rome Gas Light Co.*, 42 Barb. 591.

Judgment roll—By whom furnished.

An agreement for staying the entry of judgment is in some cases unlawful, and in such cases it cannot be enforced. *Jay v. De Groot*, 28 How. 107; affirming S. C., 17 Abb. 36(n). But the party aggrieved by the violation of such an agreement may have equitable relief. *Ib.*

ARTICLE VIII.

JUDGMENT ROLL.

Section 1. Judgment roll necessary. The Code requires that a judgment roll must, in all cases, be filed with the clerk (Code, § 281); and it has been held that the docketing of a judgment, when no judgment roll has been made and filed, is an unauthorized and illegal act, and that no lien can be acquired or enforced under it. *Townshend v. Wesson*, 4 Duer, 342. But, if all the papers constituting the judgment roll are on file, though not attached together, it seems that this will be no objection to the validity of a judgment. *Earle v. Barnard*, 22 How. 437.

Section 2. By whom furnished. Under the Code of 1848, the duty of making up the judgment roll devolved upon the clerk, and he was held responsible for its correctness. See *Renouil v. Harris*, 1 Code R. 125; S. C., 2 Sandf. 641. But the Code now provides that the judgment roll may be furnished by the successful party or his attorney. Code, § 281. Where he does so furnish it, the clerk should still see that the roll contains all its necessary parts, and, if clearly defective, he may properly refuse to receive it. See *Whitehead v. Pecare*, 9 How. 35.

It is, however, optional with the successful party to furnish the roll, or not, and an order of the court compelling him to do so will be reversed on appeal. *Heinemann v. Waterbury*, 5 Bosw. 686. In the event of his neglect to furnish the roll, it is then the duty of the clerk to collect the necessary papers from the files, attach them together, and annex thereto a copy of the judgment. Code, § 281; *Earle v. Barnard*, 22 How. 437; *Heinemann v. Waterbury*, 5 Bosw. 686. See *Miller v. White*, 10 Abb. N. S. 385, 388; S. C., 59 Barb. 434, 440. If this duty is neglected its performance will be compelled by the court, on motion of the adverse party. *Lentilhon v. Mayor, etc., of N. Y.*, 3 Sandf. 721; S. C., 1 Code R. N. S. 111.

Section 3. Contents of.

a. On failure to answer. In case the complaint is not answered by any defendant, the judgment roll must be made up by attaching together the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment. Code, § 281, subd. 1.

A copy of the judgment here intended is a copy of the entry in the judgment book. Such entry in the judgment book, and copy in the roll, is the only record evidence that judgment has been perfected. *Schenectady and Saratoga Plank Road Co. v. Thatcher*, 1 Code R. N. S. 380; S. C., 6 How. 226; *Sherman v. Postley*, 45 Barb. 348. Hence a judgment roll is defective which contains (instead of the judgment to be entered thereon) the decision of the judge in writing, as required by the two hundred and sixty-seventh section of the Code, on a trial by the court, without a jury. *Ib.* The decision of the judge is, however, a necessary part of, and should be inserted in, the judgment roll. *Thomas v. Tanner*, 14 How. 426.

It has been said that the judgment roll, in cases where the complaint is not answered, should contain, in addition to its component parts, as specified by the Code, all orders and papers "necessarily affecting the judgment," as required, when there is an answer. 1 Van Santv. Eq. Pr. 137. This is at least true of all orders which are necessary to show the regularity of the proceedings. Thus, the order for assessment, or writ of inquiry, must be inserted when damages are assessed by a jury or referee. See Code Commissioners' Book of Forms, No. 281. And, when the summons is served by publication, the order for publication, as well as the affidavit of such publication, must be inserted. Code Commissioners' Book of Forms, No. 280. See *Hallett v. Righters*, 13 How. 45; 2 Till. & Shear. Pr. 712. But when a pleading is amended by order or otherwise, the original pleading ceases to be a part of the record, and it is not only unnecessary but improper to insert it in the judgment roll. *Brown v. Saratoga R. R. Co.*, 18 N. Y. (4 Smith) 495. So when an answer has been stricken out as sham and irrelevant, the obnoxious pleading no longer constitutes a part of the record, and the defendant cannot have it entered thereon. *Briggs v. Bergen*, 23 N. Y. (9 Smith) 162.

The taxed bill of costs and affidavits used upon taxation, notice of adjustment and notice of application for judgment, the proof

 Contents of judgment roll — where answer served.

of the filing of *lis pendens*, etc., which are collateral merely to the judgment and do not "necessarily affect" it, need not be inserted in the judgment roll, though they should be filed. *Schenectady & Saratoga Plank Road Co. v. Thatcher*, 1 Code R. N. S. 380; S. C., 6 How. 226; *Kerrigan v. Ray*, 10 id. 213; *Cook v. Dickerson*, 1 Duer, 679. And in an action for the recovery of money only, where the complaint is unverified and judgment is entered upon default of the defendant to answer, it is not essential to the regularity of the judgment that the roll should contain any report of the clerk's assessment of the amount due on the instrument on which the action is brought. The Code does not, either in terms or by fair construction, require such a report. *American Exchange Bank v. Smith*, 6 Abb. 1. See, *contra*, *Squire v. Elsworth*, 4 How. 77.

A judgment roll, on failure to answer, must contain proof of due and timely service of the summons. *Macomber v. The Mayor, etc., of New York*, 17 Abb. 35; *Thomas v. Turner*, 14 How. 426.

The "report" intended by the Code (§ 281, subd. 1) as part of the judgment roll on failure to answer, is the report of the clerk or referee in cases where such is required, and it may doubtless be construed to embrace a sheriff's return to a writ of inquiry or order for assessment of damages. See 2 Till. & Shear. Pr. 711.

b. Where answer served. In all cases in which the complaint is answered by any defendant, the judgment roll must include the summons and pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment. Code, § 281, subd. 2.

Orders and papers which in their nature are merely collateral, and which do not directly affect the actual adjudication, and also matters of mere evidence will, of course, be omitted from the roll. See preceding sub-section *a*, and cases there cited.

In an action where any one of the defendants has answered, affidavit of the failure of the others to answer does not seem to be required (*Catlin v. Billings*, 4 Abb. 248; S. C., 13 How. 511); and as against a defendant who has answered or demurred, proof of service of the summons need not be inserted in the roll. *Smith v. Holmes*, 19 N. Y. (5 Smith) 271.

Where the defendant, by his answer, sets up only a counter-

On dismissal of complaint—After trial and hearing at general term.

claim, which is admitted by the plaintiff, his written admission must be inserted in the judgment roll on entering judgment for the excess of his claim. Code, § 246, subd. 1.

c. On dismissal of complaint. On the dismissal of the complaint for want of prosecution, the judgment roll is properly made up of the summons, pleadings, order dismissing the complaint, and, where the order is conditional, an affidavit showing a non-compliance with its conditions. A variance between the order of dismissal as entered in the minutes by the clerk, and the order as drawn up and inserted in the judgment roll, is held to be a mere irregularity, which can only be taken advantage of, if at all, within one year after perfecting judgment. *Martin v. Lott*, 4 Abb. 365.

d. After trial. In every judgment roll it should distinctly appear that the judgment has been rendered by a court which has jurisdiction of the proceedings, and, when issues have been joined, that those issues have been tried in some manner prescribed by law, so as to authorize the judgment. Thus, when an issue of fact has been tried by a jury, a copy of the verdict, entered in the manner prescribed by the two hundred and sixty-fourth section of the Code, must be inserted in the roll. *Thomas v. Tanner*, 14 How. 426. So if the issue has been tried before a referee, his report stands as the decision of the court, and must appear in the judgment roll. *Ib.*

When the action is tried by the court without a jury, the decision must be in writing, and, when the roll is made up, the decision becomes a necessary part of it (see *ante*, 715, sub-section *a*; *Lewis v. Jones*, 13 Abb. 427; *Burger v. Baker*, 4 id. 11); and the *opinion* of the judge will not supply its place, nor should it be inserted in the roll at all. *Thomas v. Tanner*, 14 How. 426.

e. After hearing at general term. By the provisions of the Code (§ 333), when a judgment, at general term, is rendered upon a verdict taken subject to the opinion of the court, the questions or conclusions of law, together with a concise statement of the facts upon which they arose, must be prepared by, and under the direction of, the court, and are required to be filed with the judgment roll, and to be deemed a part thereof, for the purposes of a review in the court of appeals. Code, § 333.

f. On appeal. A case or bill of exceptions is to be added to the judgment roll according to the provisions of section 281 of the Code, and this should never be omitted if the party wishes

Effect of omissions in judgment roll — Signing of.

to appeal. In case of the omission of a regular case or exceptions, the appellant is confined to such errors as appear upon the face of the record strictly. *Burgler v. Dubernet*, 7 Rob. 1; *Wilcox v. Hawley*, 31 N. Y. (4 Tiff.) 648; *Oldfield v. New York and Harlem R. R. Co.*, 14 N. Y. (4 Kern.) 321; *Smith v. Grant*, 15 N. Y. (1 Smith) 590; *Conolly v. Conolly*, 16 How. 224. See *The People v. Contracting Board*, 46 Barb. 254, 261. A case or exceptions, when settled, may, by an order, be annexed to the judgment roll at any time after the entry of judgment, in the same manner as bills of exceptions were frequently annexed under the former practice. *Lynde v. Cowenhoven* 4 How. 327; 3 Code R. 7; *Renouil v. Harris*, 1 Code R. 125; S. C., 2 Sandf. 641; *Ward v. The Central Park, North and East River R. R. Co.*, 2 Sweeny, 701.

g. Effect of omissions in. Where the judgment roll substantially supplies all necessary information, the judgment, though irregular, will not be void on account of mere technical omissions in the roll. Thus it has been held that, where the defendant appears and answers, the omission of the clerk to annex the summons to the judgment roll does not affect the validity of the judgment. *Miller v. White*, 10 Abb. N. S. 385; S. C., 59 Barb. 434; *Hoffnung v. Grove*, 18 Abb. 14, 142; S. C., 42 Barb. 548; *Calkins v. Packer*, 21 id. 275; *Earle v. Barnard*, 22 How. 437. Nor does the omission of the summons and complaint (*Martin v. Kanouse*, 2 Abb. 390, 393), or an order of reference (*Ib.*), or the omission to enter a rule for judgment on the decision of a demurrer. *Whitehead v. Pecare*, 9 How. 35. Nor is the judgment void because the roll does not contain a copy of the verdict (*Cook v. Dickerson*, 1 Duer, 679), or because it does not embrace a pleading stated to have been withdrawn by defendant before judgment, and to have been mislaid or lost. *Hatcher v. Rocheleau*, 18 N. Y. (4 Smith) 86.

But a paper containing neither process nor pleadings cannot be deemed a judgment roll, and such a general omission in the record will fail to make the judgment a lien on the property of the debtor. *Townshend v. Wesson*, 4 Duer, 342, 354.

Orders in no way affecting the judgment will, of course, be properly omitted from the roll.

Section 4. Signing of. The judgment roll ought to be signed by the clerk (*Schenectady and Saratoga Plankroad Co.*, 6 How. 226); and this has been said to be a formality which, by the

Amendment of — Suspension of entry.

judiciary act (Laws of 1847, ch. 280, § 53), was essential to constitute a judgment record. *Decker v. Johnson*, 16 N. Y. (2 Smith) 439, 450. It has, however, been held under the Code, that signing is not indispensable to the validity of the judgment. *The Artisans' Bank v. Treadwell*, 34 Barb. 553. And it has been said that the Code seems to dispense with any signing of the roll. *Macomber v. Mayor, etc., of New York*, 17 Abb. 35, 45. But see 2 R. S. 360 (373), § 11; *Williams v. Wheeler*, 1 Barb. 48; *Manning v. Guyon*, 1 Code R. 43; *Van Orman v. Phelps*, 9 Barb. 500; *Townshend v. Wesson*, 4 Duer, 342.

Section 5. Amendment of. A substantial compliance with the requirements of the statute, in affording information to all who might be affected by the judgment, is all that is necessary in making up the roll; and omissions and variances, which can work no prejudice, will be overlooked as immaterial; or, if material omissions or mistakes occur, the roll may be amended on proper application to the court. See, generally, on this subject, *Appleby v. Barry*, 2 Rob. 689; *Sears v. Burnham*, 17 N. Y. (3 Smith) 445; *Martin v. Lott*, 4 Abb. 365; *Townshend v. Wesson*, 4 Duer, 342, 353; *Jackson v. Walker*, 4 Wend. 462; *Swan v. Saddlemire*, 8 id. 676. So, if any paper, such as a case or exceptions, which is necessary for the purposes of a review, is incomplete at the time of the entry of judgment, but is afterward perfected, the court will, on proper application, allow it to be annexed *nunc pro tunc* or otherwise, so as to form part of the clerk's return on an appeal. See *Lynde v. Cowenhoven*, 3 Code R. 7; S. C., 4 How. 327; *Renouil v. Harris*, 1 Code R. 125; 2 Sandf. 641; *Lewis v. Jones*, 13 Abb. 427; *Ward v. Central Park, N. & E. River Railroad Co.*, 2 Sweeny, 701.

ARTICLE IX.

SUSPENSION OF ENTRY.

Section 1. When a suspension of entry will be ordered. When exceptions are directed to be heard in the first instance, at general term, under the special power conferred by section 265 of the Code, the entry of judgment must, of course, be suspended, until they are finally disposed of according to the provisions of the section.

Where a nonsuit involves important questions, and disposes

Adjustment of costs and notice.

of all the plaintiff's rights, it is a proper case for suspending the entry of judgment, and directing that the plaintiff's exceptions to the granting of the nonsuit be heard in the first instance at general term. *Malony v. Dows*, 18 How. 27; S. C., 9 Abb. 86. See, also, *ante*, 338, 339, 704.

ARTICLE X.

ADJUSTMENT OF COSTS.

Section 1. Where, and at what time, costs must be adjusted. This subject has been fully discussed under the general head of costs. *Ante*, 551. And it is only intended in this article, to refer to some of the most prominent features of the proceeding.

The adjustment of costs is, in strictness, a proceeding subsequent to the entry of judgment, for by section 311 of the Code, the clerk is directed to insert the costs in the entry of judgment, and not to insert the costs and then enter the judgment. The provisions on the subject are, however, merely directory, and in practice the judgment roll is not usually made up and filed until the costs are adjusted. See *Stimson v. Huggins*, 16 Barb. 658; S. C., 9 How. 86.

The clerk by whom the costs are to be adjusted, is the clerk of the court where the action is pending, and in the supreme court, the clerk of the county of venue. Code, § 466; *Union Rubber Co. v. Babcock*, 1 Abb. 262; S. C., 4 Duer, 620.

Section 2. Notice of adjustment. In all cases in which the adverse party has appeared in the action, notice of the adjustment must be given to him by the prevailing party, in the same manner as other notices are served, except that five days' notice only is required, and, if the attorneys for all the parties reside in the same city, village or town, only two days' notice. Code, § 311.

A defendant who has not appeared in the action is not entitled to any notice of adjustment (Code, § 414), but if he has appeared, he is entitled to such notice, even though he does not answer. Code, § 414; *Dix v. Palmer*, 5 How. 233; *Elson v. New York Equitable Ins. Co.*, 2 Sandf. 654; S. C., 2 Code R. 30.

The omission to give the proper notice in a case where the other party is entitled to it does not affect the regularity of the judgment. At most, such omission only renders the adjustment irregular and liable to be set aside. *Dix v. Palmer*, 5 How. 233;

 Proceedings on adjustment — Docketing.

Stimson v. Huggins, 9 id. 86 ; S. C., 16 Balb. 658 ; *Hoffnung v. Grove*, 18 Abb. 14 ; S. C. affirmed, id. 142 ; S. C., 42 Barb. 548 ; *Petrie v. Fitzgerald*, 2 Abb. N. S. 354. It was held, however, in some of the earlier cases that the judgment was made irregular by the omission of notice, and that it might be set aside on motion. See *Goldsmith v. Marpe*, 2 Code R. 49 ; *Bank of Masion v. Dwight*, id. 49 ; *Doke v. Peek*, 1 Code R. 54 ; *Elson v. New York Equitable Ins. Co.*, 2 Sandf. 654 ; S. C., 2 Code R. 30 ; *Gilmartin v. Smith*, 4 Sandf. 684 ; *Mitchell v. Hall*, 7 How. 490. See *ante*, 553, Costs.

Section 3. Proceedings on adjustment. As to the proceedings on the adjustment or taxation of costs, see *ante*, 553, where the subject is fully noticed.

Section 4. Re-adjustment. On this subject, see *ante*, 558.

ARTICLE XI.

DOCKETING.

Section 1. When a judgment may be docketed. When the judgment roll has been made up and filed as already described, the judgment may then be docketed (Code, § 282), and this should be done in all cases ; for, until docketed, the judgment cannot be enforced by execution, nor does it affect a lien on real property. So far, however, as regards its due record, and its effect independent of the mode of enforcement, the judgment is perfect when entered and signed ; nor is any further proceeding necessary to secure its priority in the administration of an intestate's estate. *Hamed's Case*, 4 Abb. 270.

A rule of the supreme court prescribes that judgments can only be docketed in the offices of the clerks of the courts, within the hours during which, by law, they are required to keep open their respective offices for the transaction of business, and at no other time. Rule 12. As to what those hours are, see *ante*, 713.

Prior to the amendment of this rule (formerly rule 9), in 1870, it was held that judgments filed and docketed by a clerk out of office hours took effect and became liens equally at the next office hour after such docketing. *France v. Hamilton*, 26 How. 180. See *Wardell v. Mason*, 10 Wend. 573 ; *Lemon v. Staats*, 1 Cow. 592. However this may have been under the former rule, it can be of little practical importance at present, as by the provisions

Mode of docketing judgment.

of the rule as it now stands the docketing can be done "at no other time" than during office hours. Where the judgment directs the sale of mortgaged premises and the payment of a deficiency, such deficiency cannot be known until after the sale and report thereon, and therefore the docketing of the judgment cannot take place until that time. *DeAgreda v. Mantel*, 1 Abb. 130; *Cobb v. Thornton*, 8 How. 66.

Section 2. Mode of docketing judgment. The following description of the origin of the docket is from an English writer: "The dogget, or as it is commonly called the *docket* or *doquet*, is an *index* to the judgment invented by courts for their own ease and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large. The practice of docketing judgments seems to have obtained as early as the reign of Henry the Eighth, in the court of common pleas, where the dockets are entered on a separate roll, called the *docket* roll, or common docket, which is of so high an authority as to even warrant an amendment of the judgment itself. But in the king's bench the docket was originally nothing more than a note on parchment or paper, containing the christian and surname of plaintiff and defendant, the debt and damages recovered, with the term and number of the judgment roll." Tidd's Pr. 939.

The mode of docketing judgments under our present practice is thus prescribed by the Revised Statutes :

At the time of filing a record of judgment the clerk shall enter in an alphabetical docket, in books to be provided and kept by him, a statement of such judgment, containing :

1. The names at length of all the parties to such judgment, designating particularly those against whom it is rendered, with their places of abode, titles, trades or professions, if any such are stated in such record ;

2. The amount of the debt, damages, or other sum of money recovered, with the costs ;

3. The hour and day of entering such docket ;

4. If the judgment be against several persons, such statement shall be repeated under the name of each person against whom the judgment was recovered, in the alphabetical order of their names respectively. 2 R. S. 361 (373), § 13. See Code, §§ 63, 282 ; Sup. Ct. Rules 11, 12 ; *Sheridan v. Andrews*, 49 N. Y. (4 Sick.) 478 ; S. C., 3 Lans. 129.

The docketing of a judgment in the office of the county clerk,

Docketing transcript.

under the provisions of the act of 1840 (see *Laws of 1840*, ch. 386), is not essential to the conclusiveness of a judgment in an action to recover possession of real property. It is sufficient if such judgment is docketed by the clerk of the court where rendered, as judgments in courts of record are required to be docketed by the provisions of the Revised Statutes as above. *Sheridan v. Andrews*, 3 *Lans.* 129; *S. C.* affirmed, 49 *N. Y.* (4 *Sick.*) 478.

Section 3. Docketing transcript. When judgment is entered in the supreme court in the office of the clerk of the county, the collateral entry in the docket which the clerk must make under the provisions of the Revised Statutes effects a complete docket of it for all purposes, so far as regards that particular county. See 2 *Whit. Pr.* 508.

But, whenever the judgment is entered in a court of limited or inferior jurisdiction, or whenever, in the supreme court, the judgment is sought to be enforced in any other county besides that in which it has been signed, that judgment must be docketed in every county into which execution is proposed to be issued. And, whenever the judgment debtor holds, or is supposed to hold, or to be likely to hold, lands in any county or counties, the judgment should, for the purposes of effecting a lien, be docketed in every such county, whether execution be actually issued or not. *Code*, § 282. As regards a justice's judgment, however, such lien cannot be enforced as against real estate, where the judgment is for less than \$25, exclusive of costs. *Code*, § 63.

The mode of docketing a judgment in counties other than that in which it is entered, for the purposes above indicated, is to obtain a transcript, or more than one if necessary, from the clerk of the court in which the judgment is entered; and such transcript, or a duplicate original, is then filed in each county in which the judgment is sought to be docketed. On filing such transcript, and upon payment of the fee thereon, the proceeding is complete. The transcript should, properly, be certified by the clerk of the court in person, who is entitled to a fee of six cents for that service, and a similar fee is likewise payable to the clerk of each county in which the judgment is docketed. See *Laws of 1840*, ch. 386, § 5; 2 *R. S.* 638 (659).

A deputy clerk has authority, however, in the absence of the clerk, to certify a copy of the docket of a judgment, and the certificate is good, even though it does not show on its face the

Effect of docketing judgment—Amending docket.

absence of the clerk. In such case the law will presume that the clerk was absent or incapable of attending to the duties of his office, and that the document has been duly issued. *Miller v. Lewis*, 4 N. Y. (4 Comst.) 554.

The transcript of a justice's judgment must, in the first instance, be filed and docketed in the office of the clerk of the county in which the judgment was rendered; and by this operation the judgment becomes a judgment of the county court. Code, § 63. Transcripts, for the purpose of enforcement in other counties, may then be obtained from the county clerk in the usual manner. *Ib.* See Code, §§ 64, 68.

Upon filing a transcript with the county clerk, a judgment of a justice of the peace must be docketed in the same manner as a judgment of a court of record; and if the county clerk fails to docket the judgment properly, and it is shown that there has been an absolute loss of the judgment through his neglect, he will be liable for the loss. *Blossom v. Barry*, 1 Lans. 190.

A transcript of the docket in the office of a county clerk, of a judgment purporting to have been rendered by a justice of the peace, with a certified copy of the transcript of the justice, are *prima facie* evidence of the judgment, but not conclusive. It is competent to prove by the testimony and docket of the justice that no such judgment has in fact been rendered. *Stephens v. Santee*, 49 N. Y. (4 Sick.) 35; reversing S. C., 51 Barb. 532. See *Christopher v. Van Liew*, 57 Barb. 17; *Fisk v. Emerson*, 44 N. Y. (5 Hand) 376; *Dickinson v. Smith*, 25 Barb. 102.

Section 4. Effect of docketing judgment. The effect of docketing a judgment is to make it a lien on the real property in the county where it is docketed, of every person against whom the judgment is rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter, for ten years from the time of docketing the same in the county where the roll was filed. Code, § 282.

A judgment lien can be created, however, only by a judgment directing, in whole or in part, the payment of money. That is, the judgment is a lien only to the extent of the money adjudged to be paid. See *De Agreda v. Mantel*, 1 Abb. 130. See this subject fully treated, *post*, Chapter XI, under "Lien of judgments."

Section 5. Amending docket. The statute relating to the docketing of judgments by transcript (see Laws 1840, ch. 386) is

Notice of judgment.

directory merely; and an error in the statement of date, amount, etc., which does not actually prejudice *bona fide* purchasers, is to be disregarded (*Fish v. Emerson*, 44 N. Y. [5 Hand] 376; *Sears v. Burnham*, 17 N. Y. [3 Smith] 445; affirming S. C., 2 Bradf. 394); and the docketing will be amended *nunc pro tunc*, on motion, except as against such persons actually prejudiced. *Hunt v. Grant*, 19 Wend. 90; *Chichester v. Cande*, 3 Cow. 42, note.

Where a judgment was docketed correctly in all respects but the initial of the middle name, and the docket was afterward corrected, on motion, it was held that the judgment took priority as a lien from the original docketing, as against a subsequent judgment obtained before the correction. *Geller v. Hoyt*, 7 How. 265. See *Aylesworth v. Brown*, 10 Barb. 167.

ARTICLE XII.

NOTICE OF JUDGMENT.

Section 1. Notice, when and why given. The object of a notice of judgment is to limit the time within which to appeal (Code, § 332), or to except, when judgment is entered upon the decision of the court or referees (Code, §§ 268, 272); and unless such notice is given, the time to appeal continues without limitation. *Fry v. Bennett*, 7 Abb. 352; S. C., 16 How. 402; affirmed, 26 id. 599 (n). As regards this point a strict compliance with the rules of practice is required (*Yorks v. Peck*, 17 How. 192); and, although a party have full knowledge of a judgment or order, his time for appealing is not limited, unless he has been actually served with notice. See *Leavy v. Roberts*, 2 Hilt. 285; S. C., 8 Abb. 310; affirmed, 27 How. 599 (n); *People v. Spalding*, 9 Paige, 607; *Gay v. Gay*, 10 id. 370; *Fry v. Bennett*, 7 Abb. 352; S. C., 16 How. 402; affirmed, 26 id. 599 (n).

The notice should be given as soon as the judgment is entered, but not sooner; and the entry should be completed by the filing of the judgment roll before giving such notice. *Sherman v. Wells*, 14 How. 522; *Sherman v. Postley*, 45 Barb. 348.

Until the amount of the judgment is definitely settled, and the costs are adjusted, no notice of the entry of judgment can be given which will limit the time to appeal (Ib.; *Champion v. Plymouth Congregational Society*, 42 Barb. 441); and it may be

Form of notice.

said, generally, that, in all cases, notice limiting the time within which to appeal cannot be given while the judgment is so incomplete that an appeal must be dismissed, on motion of the adverse party. *Sherman v. Postley*, 45 Barb. 348.

An order made out of court, upon notice, must be entered with the clerk before the notice thereof will begin to limit the time for appealing. *Gallt v. Finch*, 24 How. 193.

In computing the time within which to appeal, from the date of the entry of the order or judgment, the first day is excluded by section 407 of the Code; so that an order entered May 27th was appealed from in time by serving notice of appeal on the 27th of June. *Ib.*

Section 2. Form of notice. Care should be taken to see that the notice comprises all the particulars necessary to furnish the opposite party with full and accurate information as to the nature of the judgment. It should be written, and nothing short of a *written* notice will limit the time to appeal. See *Rankin v. Pine*, 4 Abb. 309; *Staring v. Jones*, 13 How. 423; *Fry v. Bennett*, 16 *id.* 402; S. C., 7 Abb. 352; affirmed 26 How. 599 (*n*).

So, the notice must be signed by the regular attorney of record, mentioning his place of business, or it is a nullity. *Yorks v. Peck*, 17 How. 192. And an omission to state the clerk's office in which the judgment is entered will be a fatal defect, and an amendment will not be granted but the party will be left to give notice anew. *Valton v. National Loan Fund Life Assurance Society*, 19 How. 515.

As it seems that the substance of the judgment should be embodied in the notice (see *Fry v. Bennett*, 16 How. 285; S. C., 7 Abb. 352), it would follow, as the better practice, to annex a literal copy of the judgment to, or insert it in, the notice. See 2 Till. & Shear. 715.

A mere copy of the judgment properly certified by the clerk has been held a sufficient notice of its entry to limit the right of appeal. See *Ib.*; *Mason v. Jones*, 1 Code R. N. S. 335.

When judgment is entered upon the report of a referee, a copy of the report is required to be served with the notice of the judgment, and the time within which exceptions may be taken to the report must be computed from the time of the service of such notice. Sup. Ct. Rule 39.

By whom and to whom given — Secured on appeal.

Form of notice of judgment to limit time for appeal.

(Title of cause.)

SIR: Please take notice, that a judgment in this action for _____ dollars damages and costs, in favor of the above-named plaintiff and against the above-named defendant, was entered in the office of the clerk (of this court in) the county of _____, on the _____ day of _____, 18 ____.

(Date.)

(Signature.)

(Address.)

Section 3. By whom and to whom given. The notice of judgment should proceed from the prevailing party and be served upon the opposite party, and a notice proceeding from any other person than the attorney of record for the prevailing party, or served upon an attorney who has appeared for a party without authority, does not effect a limitation of the time within which to appeal. See *Fry v. Bennett*, 16 How. 285; S. C., 7 Abb. 352; *Bates v. Voorhees*, 20 N. Y. (6 Smith) 525, 529.

ARTICLE XIII.

SECURED ON APPEAL.

Section 1. Lien of judgment, how suspended pending an appeal. The Code provides that "whenever an appeal from the judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, the court in which such judgment was recovered may, on special motion, after notice to the person owning such judgment, or to his attorney, and to the sureties to such undertaking, on such terms as such court shall see fit, by order, exempt from the lien of such judgment the whole of the real property upon which said judgment is a lien, or a specific portion thereof to be described in such order, and direct an entry to be made by the clerk on the docket of such judgment that the same is 'secured on appeal,' except that in case only a specific portion of such property is exempted from such lien such order shall direct an entry to be made on such docket that the same is 'secured on appeal as per order of the court, dated _____,' specifying the date of such order; and thereupon such judgment shall cease, during the pendency of such appeal, to be a lien upon the property so exempted as against purchasers and mortgagees in good faith." Code, § 282.

Proceedings to obtain suspension of lien.

Section 2. Proceedings to obtain suspension of lien. The mode of proceeding to obtain the suspension of the judgment lien as above is prescribed in the terms of the Code in the section just cited, and must be "on special motion, after notice to the person owning such judgment, or to his attorney, and to the sureties to the undertaking." Sec. 282. Previous to a recent amendment of this section of the Code, it was a question whether, upon the application, the sureties should have notice; some cases holding that such notice was unnecessary (*Livingston v. Roberts*, 5 Duer, 680; S. C., 3 Abb. 231; *Burrall v. Vanderbilt*, 6 Abb. 70; S. C., 1 Bosw. 637), while others held that the court might very properly require such notice to be given before proceeding with the motion. *Munn v. Barnum*, 2 Abb. 409. See *Burrall v. Vanderbilt*, 6 Abb. 70; S. C., 1 Bosw. 637. The question is no longer an open one, as the above section of the Code, as amended, expressly requires notice to be given to the sureties.

Section 3. When motion will be granted. The granting or refusing of the application reposes wholly in the discretion of the court, and the power to grant it should be carefully exercised. *Orchard v. Binninger*, 4 Abb. N. S. 368; *Fitch v. Livingston*, 4 Sandf. 712; *Livingston v. Roberts*, 5 Duer, 680; S. C., 3 Abb. 231. It is likewise in the discretion of the court to impose terms on granting the application, and the terms may be such as the court deems fit. See Code, § 282; *Munn v. Barnum*, 2 Abb. 409; *Bergen v. Stewart*, 28 How. 6.

The motion cannot be maintained unless full security has been given, sufficient to stay execution as well as to perfect the appeal. *Hoppock v. Cottrell*, 13 How. 461.

Section 4. Proceedings on order. The direction of the court, when obtained, should be reduced to the form of an order and regularly entered. When the entry by the clerk on the docket is to be made in the county of venue, the order will, of itself, be sufficient authority to the clerk to make it; but if the judgment be docketed in other counties, it will be requisite to obtain and forward certified copies to each county clerk for the same purpose. See 2 Whit. Pr. 513.

It will, of course, be proper for the party obtaining the order to see, for his own protection, that the entries are duly made.

CHAPTER X.

AMENDING OR VACATING JUDGMENTS.

ARTICLE I.

AMENDING OR CORRECTING.

Section 1. What errors may be amended. Errors in a judgment which may be amended or corrected under the powers conferred for this purpose by sections 173 and 174 of the Code, do not include judicial errors in rendering judgment. *Hotaling v. Marsh*, 14 Abb. 161; *Lillie v. Sherman*, 39 How. 287. Such errors are to be corrected in another manner. *Ib.*

To entitle a party to an amendment of a judgment within the above sections of the Code, he must establish that the judgment does not conform to the verdict, decision or report on which it is founded. *Ingersoll v. Bostwick*, 22 N. Y. (8 Smith) 425; *Johnson v. Carnley*, 10 N. Y. (6 Seld.) 570. And it has been said that alterations cannot be made in the actual adjudication, even though directions may have been omitted which would have been inserted if they had been originally asked for. *Barnard v. Bruce*, 21 How. 360; *New York Ice Co. v. Northwestern Ins. Co.*, 20 id. 255; S. C., 11 Abb. 419; 32 Barb. 534. See *Same v. Same*, 23 N. Y. (9 Smith) 357; S. C., 12 Abb. 414; 21 How. 296, in which the above doctrine is disapproved, and the general authority of the court to grant an amendment in all cases, when in furtherance of justice, asserted. See *Montgomery v. Ellis*, 6 How. 326, which holds that a party who has a judgment in his favor may, on application to the court, under section 174 of the Code, have relief in the same manner as though the judgment were against him.

In case of any mistake or miscalculation (*Rogers v. Hosack*, 18 Wend. 319), or if there be errors in the recital of the judgment, it is properly amendable on motion. *Chemung Canal Bank v. Judson*, 8 N. Y. (4 Seld.) 254. So the remedy by motion is the proper one in every case, where the error is one of form arising out of a failure to conform to the settled rules of practice of the court. *Libby v. Rosekrans*, 55 Barb. 202.

Section 2. Amendments, how made. The amendment, when granted, is to be made effectual by means of the order, which should contain special provisions on the subject, and that order should be appended to the judgment record. It is not proper to make an actual obliteration of the record, or an erasure of such parts of it as are deemed erroneous or intended to be amended. The passages stricken out may, however, be marked by brackets or lines of distinction, and an entry made in the margin referring to the order; or the judgment itself, if amended, may be entered at length, if the party so desire. *Sluyter v. Smith*, 2 Bosw. 673.

An amendment of the judgment record and the execution, made by order of the court, upon an *ex parte* application, after a sale of property by the sheriff, by substituting the true name of the defendant for the name erroneously inserted, will not have the effect to render the sale valid, or to divest the defendant of the title to the property levied on, and transfer it to the purchaser. *Farnham v. Hildreth*, 32 Barb. 277. See *Abeel v. Conhyser*, 42 How. 252; *Moulton v. de MaCarty*, 6 Rob. 470.

ARTICLE II.

VACATING.

Section 1. What judgments may be vacated.

a. As a right and as a favor. Vacating a judgment as a matter of favor, has been fully treated of in the general subject of judgment by default. See opening default, *ante*, 665. Vacating judgments as a matter of right will form the subject of the present section.

b. Void judgments. A judgment which is void, may be set aside on motion; and the statute limitation which forbids the setting aside of judgments for irregularity after one year (2 R. S. 359 [371]; Code, § 174), does not apply in such case. On the other hand, the motion to set aside a void judgment, is not barred by lapse of time however extended. *Hallett v. Richters*, 13 How. 43; *Chappel v. Chappel*, 12 N. Y. (2 Kern.) 215; *Borsdorff v. Dayton*, 17 Abb. 36, *n*; *Moulton v. de ma Carty*, 6 Rob. 470. Nor need the moving party show that he may sustain actual injury. It is sufficient that the judgment is unauthorized, to justify the application to set it aside. *Lambert v. Converse*, 22 How. 265. See *Grant v. Van Dercook*, 8 Abb. N. S. 455; S. C., 57

Vacating — Fraudulent judgments.

Barb. 165, 175. But it is only where a judgment is void that a party has an absolute legal right to have it set aside or vacated upon motion. If the court has acquired jurisdiction of the subject-matter of any action or proceeding it has jurisdiction to enter judgment, and if any error is committed the judgment is voidable, not void, and the remedy of the party aggrieved is by appeal. *Schaettler v. Gardiner*, 47 N. Y. (2 Sick.) 404; *Footte v. Lathrop*, 41 N. Y. (2 Hand) 358.

A judgment in proceedings to foreclose a lien under the mechanics' lien law (see laws 1854, chap. 402), recovered after the expiration of one year from the time of the creation of the lien is unauthorized and void, and will be vacated on motion. Laws 1854, chap. 402. See *Huxford v. Bogardus*, 40 How. 94; but see *Schaettler v. Gardiner*, 47 N. Y. (2 Sick.) 404.

c. *Fraudulent judgments.* Every court of record, unless restrained by positive enactment, has the power to vacate its judgments when it is established that they were obtained by fraud (*People v. The Mayor, etc.*, 19 How. 289; *Lowber v. The Mayor*, 26 Barb. 262; 5 Abb. 484; 15 How. 123; *Denton v. Denton*, 41 id. 221), but this power should not be exercised, except in a clear case; one that is free from any reasonable doubt. *Frink v. Morrison*, 13 Abb. 80; *Hill v. Northrop*, 9 How. 525.

A judgment obtained by connivance between the parties, or by some of them, will be vacated as fraudulent on motion of any one prejudiced thereby (*Cleveland v. Porter*, 10 Abb. 407; *Ross v. Bridge*, 24 How. 163; S. C., 15 Abb. 150); and the same is true where the judgment is entered as the result of collusion between the parties recovering judgment and the attorney for the adverse party. *People v. Mayor, etc., of New York*, 19 How. 289. So it has been held that a judgment entered in consequence of stipulations made by the attorney for the unsuccessful party without authority, may be vacated on motion of an injured party. *People v. Mayor, etc., of New York*, 11 Abb. 66. See *Ellsworth v. Campbell*, 31 Barb. 134; *Brown v. Nichols*, 42 N. Y. (3 Hand) 26.

Application to set aside a fraudulent judgment must be made within a reasonable time; otherwise it will be denied. *Corwith v. Griffing*, 21 Barb. 9; *Boyd v. Vanderkemp*, 1 Barb. Ch. 273. But in judging of the delay, time will be reckoned from the period at which the fraud was discovered.

Irregular and unauthorized judgments.—In actions commenced by publications.

d. Irregular judgments. The Revised Statutes provide that "no judgment in any court of record shall be set aside for irregularity on motion unless such motion be made within one year after the time such judgment was rendered." 2 R. S. 359 (371). See Code, § 174; *Park v. Church*, 5 How. 381; 1 Code R. N. S. 47. And a motion noticed within the year for a day after the year was held to be barred. *Cook v. Dickerson*, 1 Duer, 679.

The general rule is, that where a party seeks to set aside a judgment for irregularity he must make his motion at the first opportunity after the irregularity has taken place, and the attorney must show due diligence in informing himself of it. *Cagger v. Gardner*, 1 How. 142. See Grah. Pr. 702. Delay in moving may, however, be excused if accounted for satisfactorily. *Lewis v. Jones*, 13 Abb. 427.

A motion to set aside a judgment for irregularity will always be sustainable, whether the irregularity has taken place in the entry of judgment or in the proceedings leading to that entry. If the irregularity is clearly apparent the judgment will be set aside on motion duly made, without taking into consideration whether or not the party moving has merits in the action. *Howell v. Denniston*, 3 Cai. 96; *Perine v. Blackford*, 2 How. 131; *Hughes v. Wood*, 5 Duer, 603 (*n*). But a judgment will not be vacated as irregular by reason of any default or negligence which works no prejudice to the moving party. *Bascom v. Feazler*, 2 How. 16; 2 R. S. 425 (443).

A judgment will not be set aside as irregular on motion on account of the erroneous rulings of a judge in the progress of a trial. The proper remedy for such errors is a case or bill of exceptions. *Craig v. Fanning*, 6 How. 336; *Fisher v. Hepburn*, 48 N. Y. (3 Sick.) 41.

e. Unauthorized judgments. A judgment will be vacated on motion where it has been entered without authority of law, even though more than a year has elapsed since its entry (*Borsdorff v. Dayton*, 17 Abb. 36 (*n*); *Simonson v. Blake*, 20 How. 484; S. C., 12 Abb. 331; *Grant v. Vandercook*, 57 Barb. 165, 175; S. C., 8 Abb. N. S. 455), and this is the only remedy for such errors. They are not reviewable on appeal. *Ib.*; *Ingersoll v. Bostwick*, 22 N. Y. (8 Smith) 425.

f. In actions commenced by publication. The Code provides that, except in an action for divorce, the defendant, against whom publication is ordered, or his representatives, may, upon

good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just; and if the defense be successful, and the judgment, or any part thereof, have been collected, or otherwise enforced, such restitution may thereupon be compelled as the court directs; but the title to property sold under such judgment to a purchaser, in good faith, shall not be thereby affected. Code, § 135.

A judgment taken upon a service void for want of jurisdiction must be opened at any time (*Titus v. Relyea*, 16 How. 371; S. C., 8 Abb. 177); and this is so, even in an action for divorce, and where the plaintiff has married again since judgment was recovered. *Wortman v. Wortman*, 17 Abb. 66. See *ante*, 667.

Section 2. Proceedings to obtain order.

a. Who may move. A motion to vacate a judgment on the ground of irregularity can only be made by a party to the judgment, and cannot be made by a stranger to the record. *Murray v. Judson*, 9 N. Y. (5 Seld.) 73. See *Freeman v. Auld*, 44 N. Y. (5 Hand.) 50. But when a judgment is fraudulent, or is invalid by reason of some substantial defect, it will be set aside on the application of any party interested in impeaching it. *Chappel v. Chappel*, 12 N. Y. (2 Kern.) 215; *Bridenbecker v. Mason*, 16 How. 203.

And it is held that sureties may be let in to defend on the merits in the place of their principal in an action against him, even after a regular judgment, where it is necessary for their protection, on suitable application and excusing laches. *Jewett v. Crane*, 35 Barb. 208; S. C., 13 Abb. 97.

A party who has appeared and litigated an action cannot move to set aside the judgment therein, upon the ground that such an action cannot be maintained. *Fisher v. Hepburn*, 48 N. Y. (3 Sick.) 41.

b. When to move. See preceding section, *d.* The general rule is, that a motion to set aside a judgment on the ground of a mere irregularity, must be made within one year from the entry of such judgment. See *Dederick v. Richley*, 19 Wend. 108; *Cook v. Dickerson*, 1 Duer, 679; *Van Benthuyzen v. Lyle*, 8 How. 312; *Whitehead v. Pecare*, 9 id. 35; *Park v. Church*, 5 id. 381; S. C., 1 Code R. N. S. 47; *Moulton v. de ma Carty*, 6 Rob. 470; Code, § 174; 2 R. S. 359, § 2. And it should be made promptly, as

constant and repeated laches will often bar the motion to set aside for irregularity. *Martin v. Lott*, 4 Abb. 365.

A motion to set aside a void judgment is not, however, barred by lapse of time. *Bonnell v. Henry*, 13 How. 142; *Hallett v. Righters*, 13 id. 43; *Moulton v. de ma Carty*, 6 Rob. 470.

c. Where to move. As a general rule, the application to set aside a judgment must be made at special term; and this is so even when the judgment was entered at general term, where the point in which the irregularity was involved was not before that branch of the court. *De Agreda v. Mantel*, 1 Abb. 130; *Ayres v. Covill*, 9 How. 573.

The rule has been stated to be, that in all cases of irregularity *merely*, or to open a default, and in every case where the court at general term do not pass upon any portion of the merits, the motion is properly made at special term. *Corning v. Powers*, 9 How. 54. But the rule is otherwise, where the question is one affecting the judgment given at the general term. In such case the application should be made only at general term. *Ib.* See *Ayres v. Covill*, 9 How. 573.

It would seem that the motion to set aside should be made in the district where the venue is laid. See *Gould v. Torrance*, 19 How. 560.

d. On what papers. The application to set aside a judgment for irregularity must be made by motion, on the ordinary notice. The motion is made upon affidavits, which must clearly substantiate the irregularities complained of, and such irregularities must also be specified upon the face of the notice. Sup. Ct. Rule, 46; *Selover v. Forbes*, 22 How. 477. See *Hicks v. Brennan*, 10 Abb. 304. Any collateral facts tending to show irregularity, or a failure to acquire jurisdiction, may also be shown on the face of the moving affidavits. See *Fiske v. Anderson*, 12 Abb. 8; S. C., 33 Barb. 71.

If the application is to set aside a judgment obtained by default, the usual affidavit of merits should be made, or its substance should be incorporated in the moving papers. *Hunter v. Lester*, 10 Abb. 260; S. C., 18 How. 347.

Application to vacate a judgment, where the service of the summons was by publication, must also be made on motion, on the usual notice, founded on affidavit. The affidavit should show on its face the following requisites or facts:

1. The date of entry of judgment, and the nature of the action.

2. Unless apparent on the previous statement that such must be the case, it must be shown affirmatively that notice of the judgment has not been received by the applicant until within one year previous to the application, and the actual date and mode of receipt of such notice may be stated.

3. The face of the affidavit must show good cause why the applicant should be permitted to defend. In all cases, the usual affidavit of merits should be incorporated or annexed; and, in addition to this, the existence and nature of the defense proposed to be put in should be shown by distinct and definite allegation. 2 Whit. Pr. 590.

The affidavit, prepared in this manner, should be sworn to by the actual applicant whenever practicable; or, if not, then by his attorney or agent, stating fully the reasons why it cannot be made by the former. *Ib.*

e. Stay of proceedings. Ordinarily a stay of proceedings is desirable, and when such is the case a collateral order may be obtained, or the question may be brought up by order to show cause, including the stay required, if such an order can be procured. Good faith must, however, be observed in obtaining the order for the stay of proceedings, and the party moving will not be allowed to take advantage of it for his own purposes. An assignment made under such circumstances was declared to be void. *Jaques v. Greenwood*, 12 Abb. 232.

Section 3. Proceedings on order.

a Form of order. For form of order, see, *ante*, 670. Being drawn up, the order should be entered and served in the usual manner. Special directions should be inserted in it to the clerk of the court, and to the clerks of any counties in which the judgment has been docketed, directing them to make the necessary entries in the judgment books, for the purpose of discharging the lien as regards real property, and also to the sheriff or sheriffs, if execution has been issued, prescribing the discharge of any levy, if made, and the suspension of further proceedings on such executions. See 2 Whit. Pr. 579.

Care should be taken, by the prevailing party, to see that such entries are made by the clerk. He should also procure, and forward to the clerk of every county in which the judgment has been docketed, a transcript showing the *vacatur*, in order to the making of similar entries, so as to discharge the lien wherever it exists. If execution has been issued, a certified copy of the

order must be served upon the sheriff, or sheriffs, as the case may be. See 2 Whit. Pr. 579.

b. Terms. On granting the application to set aside a judgment where the service was by publication, the court is expressly authorized to impose such terms as may be just (Code, § 135), and a condition that may be reasonably asked for is, that the judgment and any consequent proceedings be allowed to stand as security. See *Carswell v. Neville*, 12 How. 445. If the defendant is a non-resident, security for costs may of course be required.

c. Restitution. In such case, if the defense prove successful, the Code provides for restitution (§ 153), and by rule 34 of the supreme court the plaintiff is required, at the time of making the application for judgment, to produce and file with the clerk an undertaking for not less than the amount of the judgment, with two sureties to be approved by the court, that he will abide the order of the court touching the restitution of any estate or effect which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply and be admitted to defend the action, and shall succeed in such defense.

ARTICLE III.

MOTION IN ARREST OF.

Section 1. When proper.

a. Judgment. As has been already stated, an arrest of judgment might have been obtained, under the former practice, upon application to the court, for any matter intrinsic, appearing upon the face of the record, amounting to a defect not amendable or aided at common law or by statute, and for which a writ of error would lie.

As to the existence of this remedy under the Code, see *ante*, p. 566, § 8.

CHAPTER XI.

LIEN OF JUDGMENTS.

ARTICLE I.

WHAT JUDGMENTS MAY BE A LIEN.

Section 1. Must direct payment of money. The only judgment which can operate to create a lien is one which directs in whole or in part the payment of money. Code, § 282. It is not necessary, however, that the judgment should be solely for the payment of money, but if it is not it operates as a lien only to the extent of the money adjudged to be paid. *DeAgreda v. Mantel*, 1 Abb. 130.

So in order that a judgment may be made a lien, it is necessary that the amount due under it be judicially ascertained, and until this is done no lien exists. *Ib.*

ARTICLE II.

LIEN, HOW SECURED.

Section 1. Docketing necessary. The provisions of the Code as to the lien of judgments are substantially the same as those of the Revised Statutes, and such lien can be secured only by docketing the judgment in conformity with the provisions of the statute. See 2 R. S. 360 (373); *Blydenburgh v. Northrop*, 13 How. 289. Under these provisions it was held that there was no lien created by the recovery of a judgment until it was docketed, and therefore no question of notice or contest as to priority could arise between a creditor holding a judgment not docketed and a party having any specific lien by mortgage, or any conveyance of title. The date and order of the lien of a judgment was, in all cases, merely a question of time, depending upon the day and hour when it was docketed, as required by the statute, and thus acquired the rights which the statute gave. *Buchan v. Sumner*, 2 Barb. Ch. 165, 193. And all the reasoning of this case is held to be applicable to judgments under the Code. *Blydenburgh v. Northrop*, 13 How. 289.

The lien.

On a judgment by confession under the Code, there is no suit, no recovery or adjudication, either actual or formal, of any court or officer, until the judgment is entered by the clerk; and it is the act of this officer that creates not only the lien, but the judgment. Until such entry is made, there is no judgment, and nothing of its existence of which notice can be given to subsequent incumbrancers or grantees. *Blydenburgh v. Northrop*, 13 How. 289.

Judgments and decrees, rendered in the United States courts, duly recorded, need not be docketed in the several counties of the district. They are, however, a lien upon all the real estate of the judgment debtor, located within the district; and in this respect the lien of a United States judgment takes effect differently from a State judgment. See *Crandell v. Cropsey*, 10 N. Y. Leg. Obs. 1; *Lombard v. Bayard*, Wall, Jr., 196; 7 Penn. Law Jour. 250.

ARTICLE III.

THE LIEN.

Section 1. Extent of. The lien of a judgment extends to all the real property including lands, tenements and hereditaments (Code, § 462; *Rodgers v. Bonner*, 45 N. Y. [6 Hand] 379) in the county where the judgment is docketed, of every person against whom it is rendered, or which he may acquire in such county at any time thereafter, for ten years from the time of docketing it in the county where it was rendered. Code, § 282.

This lien does not, however, extend to future estates in expectancy (*Jackson v. Middleton*, 52 Barb. 9); nor does it attach upon the mere legal title to lands existing in the defendant, where the equitable title is in another person. *Lounsbury v. Purdy*, 18 N. Y. (4 Smith) 515; affirming S. C., 46 Barb. 376; 11 id. 490. So judgments do not become liens on leasehold property, unless the lessee (the judgment debtor) is in possession; and if the lessee transfers his lease to another party, without taking possession of the premises, the lien of the judgment never attaches. *Crane v. O'Connor*, 4 Ed. Ch. R. 409. But if the lessee is in possession, leasehold estates, even from year to year, are bound by a judgment lien. See *Bigelow v. Finch*, 17 Barb. 394; *Everison, v. Sawyer*, 2 Wend. 507. And it is held, that improvements made upon land by a purchaser of the premises or of a lessee

Priority and duration of.

thereof, are subject to the lien of a judgment which was a lien upon the land at the time of the purchase, even though the purchaser had no knowledge of such judgment. *Cook v. Kraft*, 3 Lans. 512.

The interest of any person holding a contract for the purchase of lands, is not bound by the docketing of any judgment against him (1 R. S. 744 [696]), and this provision is held to be applicable whether he has fully paid for the land or not. *Grosvenor v. Allen*, 9 Paige, 74.

If land is sold under the first judgment, the lien of subsequent judgments is on the surplus in the order of their priority. *Averill v. Loucks*, 6 Barb. 470.

Section 2. Priority of. When duly docketed, judgments rank according to their legal priorities (*Stevens v. Bank of Central New York*, 31 Barb. 290; *Rodgers v. Bonner*, 45 N. Y. [6 Hand.] 379), and the date and order of the lien is, in all cases, a question of time, depending upon the day and hour when the judgment was docketed. *Blydenburgh v. Northrop*, 13 How. 289.

A judgment creditor who advances his money upon the faith of an unincumbered title upon the record, without notice, is entitled to the lien acquired thereby in preference to the secret, unrecorded lien of the vendor, for a part of the purchase-money. Such a judgment creditor is to be regarded as a *quasi* purchaser for a valuable consideration without notice. *Hulett v. Whipple*, 58 Barb. 224.

It has been held that all judgments filed and docketed by a clerk out of office hours must take effect and become liens equally at the next office hour after such docketing, although some may have been entered before others. *Wardell v. Mason*, 10 Wend. 573; *France v. Hamilton*, 26 How. 180. These decisions were made, however, prior to the recent amendment of the rules of the supreme court, by the 12th of which it is provided that judgments must be docketed with the clerks during their hours of business, and *at no other time*. See, *ante*, 713.

Section 3. Duration of. The lien of a judgment ceases as against purchasers in good faith and subsequent incumbrancers at the end of ten years from the time of docketing, whether with or without notice, unless they were actually guilty of fraud. See *Pettit v. Shepherd*, 5 Paige, 493; *Wood v. Morehouse*, 45 N. Y. (6 Hand.) 368, 377; *Tufts v. Tufts*, 18 Wend. 621; *Little v. Harvey*, 9 id. 157. But as against the judgment debtor himself and his heirs

Suspension of.

(*Wallermire v. Westover*, 14 N.Y. (4 Kern.) 16; *Peru Iron Co.'s Case*, 7 Cow. 554; *Scott v. Howard*, 3 Barb. 319), or his grantees without a valuable consideration (*Mohawk Bank v. Atwater*, 2 Paige, 54; *Mower v. Kip*, 2 Edw. Ch. 165), such lien continues for the full period of twenty years, as prescribed by the Code, section 90. So where the grantee of a judgment debtor colludes with him to defraud the creditor, the lien remains in full force for twenty years at least. *Pettit v. Shepherd*, 5 Paige, 493.

Where the lien of a judgment has ceased by lapse of time, the court will interfere in a summary way in behalf of *bona fide* purchasers, and order a perpetual stay of execution unless the judgment creditor shall satisfy the court that there is probable cause for alleging that the purchase was not *bona fide*. The mere allegation of the creditor that he thinks he can prove that they are not *bona fide* purchasers is not sufficient. *Wilson v. Smith*, 2 Code R. 18.

It is provided, by the Code, that the time during which the party recovering or owning a judgment shall be, or shall have been, restrained from proceeding thereon by any order of injunction or other order, or by the operation of any appeal, shall constitute no part of the ten years from the time of docketing, as against the defendant in such judgment or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor, or mortgagee in good faith. § 282.

ARTICLE IV.

SUSPENSION OF.

Section 1. On appeal. See, *ante*, Chapter IX, Article 13, page 727. The manner in which the lien of the judgment is suspended, on appeal, is thus prescribed by section 282 of the Code: "Whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, the court in which such judgment was recovered may, on special motion, after notice to the person owning such judgment, or to his attorney, and to the sureties to such undertaking, on such terms as such court shall see fit, by order, exempt from the lien of such judgment the whole of the real property upon which said judgment is a lien, or a specific portion thereof to be described in such order, and direct an entry to be made by the clerk on the docket of such judgment, that

Imprisonment of debtor—Extinction of lien.

the same is 'secured on appeal,' except that, in case only a specific portion of such property is exempted from such lien, such order shall direct an entry to be made on such docket that the same is 'secured on appeal as per order of the court, dated ,' specifying the date of such order; and thereupon such judgment shall cease, during the pendency of such appeal, to be a lien upon the property so exempted as against purchasers and mortgagees in good faith."

Section 2. Imprisonment of debtor. The lien of a judgment is suspended by an actual imprisonment of the debtor on execution under the judgment. *Jackson v. Benedict*, 13 Johns. 533. See *Bank of Beloit v. Beale*, 20 How. 331; S. C., 11 Abb. 375; 7 Bosw. 611; S. C. affirmed, 34 N. Y. (7 Tiff.) 473. But if the debtor escapes, or is discharged under a statute, the lien revives. See *Jackson v. Benedict*, 13 Johns. 533; *M'Guinty v. Herrick*, 5 Wend. 240; *Chapman v. Hatt*, 11 id. 41.

Where a judgment has been vacated, and afterward the decision is reversed and the order vacating the judgment is set aside, the lien of the judgment is restored, except as to intervening purchasers or incumbrancers in good faith. *King v. Harris*, 30 Barb. 471; S. C. affirmed, 34 N. Y. (7 Tiff.) 330. So, where an entry of satisfaction is vacated by the court, it will be without prejudice to rights acquired by third persons in good faith and for value; and this is especially so where the error is occasioned by the creditor's own act. *Beebe v. Bank of New York*, 1 Johns. 529; *Taylor v. Ranney*, 4 Hill, 619. See *Booth v. Farmers and Mechanics' National Bank*, 50 N. Y. (5 Sick.) 396; reversing S. C., 4 Lans. 301.

The lien of a judgment is not affected by the suffering of an execution against personal property, to lie dormant in the sheriff's hands. *Muir v. Leitch*, 7 Barb. 341. Nor is it in any way affected by an agreement to postpone payment of the judgment. *Ib.*

ARTICLE V.

EXTINCTION OF LIEN.

Section 1. Lien, how extinguished.

a. Satisfaction of judgment. The satisfaction of a judgment, by payment, in whole or in part, will, of course, release the lien to the extent of the payment; and it cannot be restored as a lien by any subsequent agreement between the parties. *De la Vergne v.*

Satisfaction of judgment — Levy and sale.

Evertson, 1 Paige, 181; *Troup v. Wood*, 4 Johns. Ch. 228, 247. See *Winslow v. Clark*, 2 Lans. 377, 380. But an agreement to discharge any portion, in excess of the payment, is a contract invalid for want of consideration, and cannot, therefore, extinguish the entire judgment. *Garvey v. Jarvis*, 54 Barb. 179; S. C. affirmed, 46 N. Y. (1 Sick.) 310; *Deland v. Hiatt*, 27 Cal. 611. A satisfaction under seal is, however, good, though full payment were not made. *Beers v. Hendrickson*, 6 Rob. 53; 45 N. Y. (6 Hand) 665.

If the amount of the judgment be paid by one who is not a party and not liable thereon, the judgment will be extinguished or not, according to the desire of the person paying. *Alden v. Clark*, 11 How. 209; *Harbeck v. Vanderbilt*, 20 N. Y. (6 Smith) 395. But where one of several defendants, jointly liable under the judgment, pays to the other party the entire sum, the judgment becomes thereby extinguished, whatever may be the intention of the parties to the transaction. *Ib.*; *Ontario Bank v. Walker*, 1 Hill, 653; *Bank of Salina v. Abbot*, 3 Denio, 181.

An attorney at law has no authority, by virtue of his general retainer, to satisfy a judgment without payment of the full amount in money; and, if he compromises by taking less than the entire sum due, or by receiving any thing else than money, the plaintiff is not bound by the compromise (*Beers v. Hendrickson*, 6 Rob. 53; 45 N. Y. (6 Hand) 665; *Lewis v. Woodruff*, 15 How. 539; *Jackson v. Bartlett*, 8 Johns. 361), but it will bind the attorney in person. *Carstens v. Barnslof*, 11 Abb. N. S. 442. In cases where the law authorizes the sheriff, or any other officer, to accept payments of judgments, his authority is as limited as that of an attorney acting under a general retainer. *Mitchell v. Hackett*, 14 Cal. 661; *Ellis v. Smith*, 42 Ala. 349.

It is held that a tender of the money due upon a judgment, if not accepted, does not operate as an extinguishment of the lien. *Jackson v. Law*, 5 Cow. 48; S. C. affirmed, 9 id. 641; *Ex parte Peru Iron Co.*, 7 id. 540; *People v. Beebe*, 1 Barb. 379. See *Tiffany v. St. John*, 5 Lans. 153; and see *Kortright v. Cady*, 21 N. Y. (7 Smith) 343, which decides that the tender of the money due on a mortgage discharged the lien. See, also, *Trimm v. Marsh*, 3 Lans. 509; *Miner v. Beekman*, 11 Abb. N. S. 147; S. C., 42 How. 33; 50 N. Y. (5 Sick.) 337; 14 Abb. N. S. 1.

b. Levy and sale. A levy upon personal property, sufficient in value to satisfy the judgment, has been said to extinguish the lien (*Voorhees v. Gros*, 3 How. 262; *Ex parte Lawrence*, 4 Cow.

417; *Wood v. Torrey*, 6 Wend. 562; *Hoyt v. Hudson*, 12 Johns. 207; *Troup v. Wood*, 4 Johns. Ch. 228; *Jackson v. Bowen*, 7 Cow. 13), and that a release of such property does not revive it. *Ib.*

A mere levy, however, on sufficient personal property, without any thing more, never amounts to a satisfaction of the judgment. So long as the property remains in legal custody the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain action on the judgment, nor use it for the purpose of becoming a redeeming creditor. The mere levy neither gives any thing to the creditor nor takes any thing from the debtor. It does not divest title; it only creates a lien on the property. *The People v. Hopson*, 1 Denio, 578. See *Green v. Burke*, 23 Wend. 490; *Ostrander v. Waller*, 2 Hill, 329.

The true rule has been stated to be, that the judgment is satisfied when the execution has been so used as to change the title, or in some other way deprived the debtor of his property. This includes the case of a levy and sale, and also the case of a loss or destruction of the goods, after they have been taken out of the debtor's possession by virtue of the process. *People v. Hopson*, 1 Denio, 574.

c. Recovery of new judgment. It has been held that, where a creditor recovers a new judgment on a judgment, he loses his first lien (*Purdy v. Doyle*, 1 Paige, 558); but the better doctrine would seem to be, that, in such a case, the lien of the earlier judgment is not affected by the recovery of a new judgment, if of no higher degree than the former. See *Harvey v. Wood*, 5 Wend. 221; *Millard v. Whitaker*, 5 Hill, 408; *Andrews v. Smith*, 9 Wend. 53; *Jackson v. Shaffer*, 11 Johns. 513; *Mumford v. Stocker*, 1 Cow. 178.

d. Lapse of time. The lapse of ten years from the time of docketing the judgment will operate as an extinction of its lien. Code, § 282. But it is further provided that the time during which the party recovering or owning the judgment shall be restrained from proceeding thereon by any order of injunction or other order, or by the operation of any appeal, shall constitute no part of the prescribed time as against the defendant in the judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith. *Ib.*

CHAPTER XII.

SETTING OFF JUDGMENTS.

ARTICLE I.

WHAT JUDGMENTS MAY BE SET OFF.

Section 1. In general. The practice of setting off one judgment against another, in a proper case, has long existed ; but the power to do so was incidental to a court of equity, and exclusively exercised by such courts until within a comparatively recent period, when courts of law also undertook to set off one judgment against another. *Simson v. Hart*, 14 Johns. 63. And not only will one judgment be set off against another judgment of the same court, but the power will also be exercised where the judgments are in different courts, if the parties are interested in the respective judgments in the same right, and the judgment is conclusive, and the rights of the parties are not doubtful, complicated or intricate. *Story v. Patten*, 3 Wend. 331 ; *Harris v. Palmer*, 5 Barb. 105 ; *Ross v. Hicks*, 11 Barb. 481. And this rule extends to a judgment in a justice's court. *Ewen v. Terry*, 8 Cow. 126 ; *Ross v. Hicks*, 11 Barb. 481.

Where, however, the judgments to be set off are in different courts, the application should be made in that court where the judgment against the applicant was recovered. That court alone has the direct power to control the proceedings on the judgment. *Cooke v. Smith*, 7 Hill, 186. See *Brewerton v. Harris*, 1 Johns. 144 ; *People v. New York C. P.*, 13 Wend. 652.

If it is desired to set off a judgment obtained in a justice's court, which has been filed with the county clerk, the application must be made to the county court. *Ross v. Hicks*, 11 Barb. 481.

A judgment recovered against two jointly may properly be set off against a judgment in favor of one of them individually. *Simson v. Hart*, 14 Johns. 63, 75 ; *Graves v. Woodbury*, 4 Hill, 559.

Section 2. Judgments in rem. A judgment merely *in rem* is not such a one as may properly be set off. Thus, a judgment

Motion, where made — Motion papers — Proceedings on order.

tion is to be exercised in such a manner as to do equity and prevent injustice. If justice will be promoted by it, and if no other rights will be infringed by it, then the set-off will be ordered, although the parties to the different judgments are not the same. *O'Conner v. Murphy*, 1 H. Bl. 659; *Baker v. Hoag*, 6 How. 201.

In cases where, by action, the relief sought would be granted as a matter of strict statutory right, the courts will usually refuse to interfere on motion. *Purchase v. Bellows*, 9 Bosw. 642; S. C., 16 Abb. 105.

A denial of the motion does not constitute a bar to an action for the same purpose. *Simson v. Hart*, 14 Johns. 63.

Section 2. Motion, where made. Application should, of course, be made to the court rendering the judgments, where the judgments are in the same court; but if the judgments are in different courts, the application must be made in that court in which judgment against the moving party was recovered. *Cooke v. Smith*, 7 Hill, 186. See *Brewerton v. Harris*, 1 Johns. 144; *People v. New York C. P.*, 13 Wend. 652.

Section 3. Motion papers. The motion papers should be entitled in all the causes containing the judgments, which are the subjects of the application. *Alcott v. Davison*, 2 How. 44.

ARTICLE III.

PROCEEDINGS ON ORDER.

Section 1. Satisfaction of judgment. If the motion to set off is granted, the judgment so set off is satisfied, and the court will order it discharged of record. *Schroeppe v. Jewell*, 1 Cow. 208.

Satisfaction, how acknowledged — Compelling acknowledgment.

not executed in the name of, or under the seal of, the corporation. *Booth v. Farmers and Mechanics' National Bank*, 50 N. Y. (5 Sick.) 396; reversing S. C., 4 Lans. 301.

Section 3. Satisfaction, how acknowledged. Acknowledgment of satisfaction may be made before the clerk (Laws of 1834, ch. 262, § 3), or some judge of the court in which the judgment was rendered, or a county judge or commissioner of deeds, who must certify that the party making it is known to him, or has been made known by competent proof. 2 R. S. 362 (375), § 23.

If satisfaction is acknowledged by virtue of a letter of attorney or other instrument containing a power to acknowledge satisfaction, such instrument must be acknowledged or proved before the clerk of the court in which the judgment was rendered, or before some officer authorized to take acknowledgments of conveyances of real estate, and must be filed with the satisfaction-piece. Laws of 1834, ch. 262, § 2; 4 Edm. Stat. at Large, 622.

In case the party in whose favor the judgment has been rendered resides out of the State, the satisfaction-piece must be acknowledged before some officer authorized to take acknowledgments of deeds for this State. *Ib.*

The satisfaction-piece, being regularly made out, should be filed with the clerk in whose office the judgment was originally docketed, who must then enter satisfaction on the docket and cancel the judgment. 2 R. S. 362 (375), § 22. The clerk must, on demand, and on payment of the fee of 12½ cents, give a certificate of satisfaction, which should be filed with any other clerk in whose office a transcript of the judgment has been filed, and will then discharge its lien. See 2 R. S. 363 (375), § 27; 4 Edm. Stat. at Large, 688; *id.* 622, 627, 634; 5 *id.* 79.

Section 4. Compelling acknowledgment. Where a judgment is fully paid, and the creditor refuses to acknowledge satisfaction, the court will, on motion, compel him to enter satisfaction at his own expense, and to pay the costs of the motion (*Briggs v. Thompson*, 20 Johns. 293), or will order satisfaction to be entered on the record without acknowledgment. *Pinder v. Morris*, 3 Cai. 165; *Bergen v. Boerum*, 2 *id.* 256.

Only a party to the record, however, or a person having some legal or equitable interest in the canceling of the judgment, is entitled to make application to the court to order it satisfied of record, and such application must be founded on recognized

Compelling acknowledgment — Form of satisfaction-piece.

legal or equitable grounds. *Matter of Beers*, 5 Rob. 643. An before the interference of the court can be asked, the judgment debtor must prepare a satisfaction-piece, present it to the creditor, and offer to pay the expense of its execution. 2 R. S. 36 (375); *Briggs v. Thompson*, 20 Johns. 293; *Pettengill v. Mather* 16 Abb. 399; *McBair v. Hanson*, *id. note*.

Where the sheriff has collected money sufficient in amount to satisfy the judgment, but has made default in his return, the court will not direct satisfaction to be entered of record, but will stay all proceedings on the judgment, thus leaving the creditor to his remedy against the sheriff. *Hamlin v. Boughton*, 4 Cow. 65. So, where a third person makes application to be protected against a judgment which is an apparent lien upon property purchased by him, and which is satisfied so far as in equity to cancel that lien, but which is not clearly satisfied in full, the court, instead of entering satisfaction, will order a perpetual stay of execution. *Smith v. Page*, 15 Johns. 395. See *Lansing v. Orcott*, 16 Johns. 4; *Frink v. Morrison*, 13 Abb. 80.

Bringing an action upon a judgment, and recovering and perfecting a judgment thereon, is no satisfaction of the first judgment. The second judgment must be satisfied, in fact, to warrant a motion for entry of satisfaction upon the record in the first. *Mumford v. Stocker*, 1 Cow. 178. See *Briggs v. Thompson*, 20 Johns. 294. But where, for the same cause, two suits proceed to judgment and execution, the satisfaction of either may be shown in discharge of the other. *Bowne v. Joy*, 9 Johns. 221.

Section 5. Form of satisfaction-piece.

When satisfaction is acknowledged by the attorney, the satisfaction may be in the following form :

SUPREME COURT — FULTON COUNTY.

A. B.	}	<i>Judgment entered January 1, 1873.</i>	
v.		Recovery.....	\$500 50
C. D.		Costs	15 00
			<hr/> \$515 50

D. M., *Plaintiff's Attorney*.

The above-described judgment has been fully paid and satisfied.
September 15 1873.

D. M., *Attorney for Plaintiff*.

Form of satisfaction by plaintiff—Entry of satisfaction.

FULTON COUNTY, ss.:

On this 15th day of September, 1873, before me came the above-named D. M., attorney for the above-named plaintiff, to me known to be the person who executed the above instrument of satisfaction, and acknowledged the execution thereof.

R. M., *Justice of the Peace.*

Form of satisfaction by plaintiff.

SUPREME COURT—FULTON COUNTY.

E. F.

v.

G. H.

} *Satisfaction of judgment.*

Satisfaction is acknowledged of judgment between E. F., plaintiff, and G. H., defendant, for the sum of \$750.25. Judgment entered in the judgment book of the county of Fulton, on the 26th day of June, 1872.

Dated *September 12*, 1873.

E. F.

FULTON COUNTY, ss.:

On this 12th day of September, 1873, before me came the above-named E. F., to me known to be the person described in, and who executed the above instrument of satisfaction and acknowledged the execution thereof.

R. M., *Justice of the Peace.*

A satisfaction-piece of a judgment will not be reformed, nor will it be considered efficacious for any other purpose than that expressed on its face, when no mutual mistake has occurred as to its terms, although there is some evidence that it was intended to accomplish more than it purports to authorize. *Beers v. Hendrickson*, 6 Rob. 53.

ARTICLE II.

ENTRY OF SATISFACTION.

Section 1. On satisfaction-piece. Filing the satisfaction-piece is not in itself a satisfaction of the judgment, but is only an authority to enter a satisfaction, and until such entry is made on the roll by the clerk the judgment is not satisfied. *Beers v. Hendrickson*, 6 Rob. 53; *Lounds v. Remsen*, 7 Wend. 35. See *Booth v. The Farmers and Mechanics' National Bank*, 4 Lans. 301. But in the absence of proof to the contrary, the presumption arising from the giving of a satisfaction-piece is that it was given upon payment of the judgment. The satisfaction-piece is

When satisfaction will be vacated — Canceling satisfaction.

ARTICLE III.

VACATING SATISFACTION.

Section 1. When satisfaction will be vacated. Where the acknowledgment or entry of satisfaction is procured through fraud, or in any other way that entitles the creditor to avoid it, the court will set it aside on motion. Thus, where the plaintiff, after he had assigned a judgment, and had given notice to the defendant of such assignment, entered up satisfaction on the record, the entry of the satisfaction was held to be fraudulent and void, and it was ordered to be vacated. *Wardell v. Eden*, 2 Johns. Cas. 258; S. C., 1 Johns. 534, *note*. So, where a sale on an execution was discovered to be void, the court vacated the satisfaction and authorized a new execution. *Suydam v. Holden*, Seld. Notes, No. 4, 16. See *Field v. Paulding*, 1 Hilt. 187; S. C., 3 Abb. 139; *Anderson v. Nicholas*, 4 Rob. 630. The satisfaction entered on record, must, however, as to all persons who stand in the situation of innocent purchasers for a valuable consideration be deemed valid and effectual; and the restoration of the judgment, as it respects their rights, can only be considered as forming a lien from the time it was so restored. *Bebee v. Bank of New York*, 1 Johns. 529; *Taylor v. Ranney*, 4 Hill, 619.

Section 2. Canceling satisfaction. The cancellation provided for by the Revised Statutes (2 R. S. 362 [375], § 22), is not of the record, or by an entry on the roll, but a cancellation of the docket, and since the Revised Statutes the practice of the clerks in the supreme court has been to make a memorandum in the docket as well in the case of a satisfaction piece as in the case of an execution returned satisfied, making no more formal cancellation; and such entry is held to be a cancellation of the docket within the meaning of the statute. See *Booth v. The Farmers and Mechanics' N. Bank*, 4 Lans. 301; but see *Lownds v. Remsen*, 7 Wend. 35, in which it is held that a satisfaction-piece is not a record, and that an entry thereof on the docket does not amount to a discharge of the judgment; but to have that effect it must be entered on the judgment roll. See, *ante*, art. 2, § 1, p. 750.

Section 3. Unauthorized cancellation. The clerk is authorized to cancel and discharge the docket upon the filing with him of an acknowledgment of satisfaction, signed by the party in whose

favor the judgment was obtained, and authenticated in a particular manner. Unless this has been done the act of the clerk in canceling the docket is without jurisdiction, and void as to the parties whose rights purport to be affected by it. See *Booth v. Farmers and Mechanics' N. Bank*, 4 Lans. 301.

It seems to be conceded by the court in *Lownds v. Remsen*, 7 Wend. 35, that if the satisfaction had been entered on the roll it would have been conclusive on the plaintiff until vacated, though entered on a forged satisfaction-piece. But this was upon the technical ground that the record itself imports absolute verity and is deemed to be the act and judgment of the court, while an entry by the clerk in the docket has no such effect, the docket being no part of the record of the court. See *Booth v. Farmers and Mechanics' N. Bank*, 4 Lans. 301.



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